No. 12320

United States
Court of Appeals
For the Ninth Circuit.

JAMES G. SMYTH, Collector of Internal Revenue, for the First District of California,

Appellant,

vs.

MURIEL E. BARNESON, also known as Muriel Elfrida Barneson, an Incompetent Person, by Lionel T. Barneson, Guardian,

Appellee.

Transcript of Record

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12320

United States
Court of Appeals
For the Ninth Circuit.

JAMES G. SMYTH, Collector of Internal Revenue, for the First District of California,

Appellant,

vs.

MURIEL E. BARNESON, also known as Muriel Elfrida Barneson, an Incompetent Person, by Lionel T. Barneson, Guardian,

Appellee.

Transcript of Record

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,
United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California.
Attorney for Defendant and Appellant.

BRADY & NOSSAMAN,
433 South Spring Street,
Los Angeles, California.
Attorneys for Plaintiff and Appellee.

Trial before the Honorable Louis E. Goodman, District Judge, sitting without a jury.

In the District Court of the United States, in and for the Northern District of California, Southern Division

Civil Action File No. 27929G

MURIEL E. BARNESON, also known as Muriel Elfrida Barneson, An Incompetent Person, by Lionel T. Barneson, Guardian,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue for the First District of California,

Defendant.

COMPLAINT
(To Recover Income Taxes)

Plaintiff herein for cause of action against the defendant alleges:

1. Lionel T. Barneson is the duly appointed, qualified and acting guardian of the person and estate of Muriel E. Barneson, also known as Muriel Elfrida Barneson, an incompetent person, plaintiff herein. A certified copy of Letters of Guardianship is attached hereto as Exhibit "A".

2. At all times hereinafter mentioned, plaintiff, Muriel E. Barneson, and the guardian of her person and estate, Lionel T. Barneson, were, and still are, citizens of the United States, domiciled in the State of California.

3. Defendant is, and at all times since May 14,

1945, has been, the duly appointed and acting Collector of Internal Revenue for the First District of California.

4. On May 8, 1928, plaintiff loaned John Barneson, her father, the sum of $100,000.00 in cash, and on May 15, 1929, plaintiff loaned said John Barneson the further sum of $50,000.00 in cash. Plaintiff did not keep any books of account, either at the times of the aforesaid loans or at any later time. John Barneson, at all material times, kept books of account. The aforesaid loans were recorded on John Barneson's books of account by credit entries in an account entitled, "Muriel E. Barneson. Loan a/c." No debit entries were ever made in said account.

5. John Barneson died February 25, 1941, and his estate was probated in the Superior Court of the State of California in and for the County of San Mateo, Case No. 9360 in the files of said court. On the date of his death said John Barneson was indebted to plaintiff for the monies loaned to him on May 8, 1928, and May 15, 1929, as alleged in paragraph 4 above, and the aforesaid account entitled, "Muriel E. Barneson. Loan a/c," showed a credit balance of $150,000.00 on said date of death.

6. At all times material hereto the aforesaid John Barneson was an individual of large financial wealth and possessed the requisite financial ability to have paid his aforesaid indebtedness to plaintiff in full on demand. Plaintiff, however, was at all

material times a person of even larger financial resources than said John Barneson. Plaintiff never made demand on her father for repayment but at all times expected eventual repayment of the aforesaid indebtedness and never forgave or cancelled the same or any part thereof. John Barneson expected that plaintiff would eventually be repaid said indebtedness either by him during his lifetime or, if not, then by his estate. At all material times the estate of John Barneson was of such size and composition that the debt of said John Barneson to plaintiff could have been readily paid in full; the Commissioner of Internal Revenue, in his final determination of estate tax liability of the estate of John Barneson, determined that the net estate for the "additional tax" was $629,018.82 and that the "net tax payable and defense tax" was in the amount of $113,722.55.

7. Following the death of said John Barneson, and within the time provided by law for the filing of claims against his estate, plaintiff, acting through the guardian of her person and estate, presented her written and verified claim for the indebtedness resulting from plaintiff's loans to said John Barneson of $100,000.00 on May 8, 1928 and $50,000.00 on May 15, 1929. The collection of said indebtedness was barred by the applicable statute of limitations prior to and at the instant of said John Barneson's death, and said claim therefor was, solely for that reason, rejected by Honorable A. R. Cotton, Judge of the Superior Court of the

State of California in and for the County of San Mateo on June 23, 1941. The plaintiff did not bring suit on said claim within three months after June 23, 1941, or at any time thereafter.

8. The aforesaid indebtedness of John Barneson to plaintiff in the amount of $150,000.00 did not become worthless prior to January 1, 1941, the beginning of the taxable year of plaintiff here involved, but, on the contrary, said indebtedness had a value equal to its face value at all times between the dates in 1928 and 1929 when plaintiff made the loans to John Barneson and the instant immediately preceding the instant of his death on February 25, 1941. Said indebtedness became utterly worthless within the taxable year, solely by reason of the death of said John Barneson and rejection of the claim by the probate court in that year, and plaintiff was entitled to claim a deduction therefor in her income tax return for the calendar year 1941 under the authority of Section 23(k)(1) of the Internal Revenue Code as amended by Section 124 of the Revenue Act of 1942.

9. On or before March 15, 1942, plaintiff filed with the then Collector of Internal Revenue for the First District of California, her federal income tax return for the calendar year 1941 on Form 1040 of the Treasury Department Internal Revenue Service. Said return showed the following items of gross income and deductions therefrom:

	INCOME	
2. Dividends	$102,525.45	
3. Interest on bank deposits, notes, etc.	382.47	
5. Rents and royalties	15,708.47	
7. (b) Net long-term loss from sale or exchange of capital assets	423.15	
8. Income from partnerships; fiduciary income; and other income	14,191.23	
10. Total income in items 1 to 9		$132,875.26
	DEDUCTIONS	
12. Interest	220.68	
13. Taxes	12,510.62	
15. Bad debts	150,000.00	
16. Other deductions authorized by law	45.11	
17. Total deductions in items 11 to 16		$162,776.41
18. Net income (item 10 minus item 17)		.00

10. Among the deductions aggregating $162,-776.41, as alleged in paragraph 9 above, was item 15—bad debts—in the amount of $150,000.00. The basis on which plaintiff took said deduction of $150,000.00 was described in a written statement attached to said return as filed, which statement was subscribed and sworn to before a Notary Public, by Lionel T. Barneson, as plaintiff's guardian. The body of said statement reads as follows:

"This is a statement with reference to bad debt reduction of $150,000 claimed as Item 15 on the Federal Return and as Item 16 on the California return.

"In 1928 and 1929, the taxpayer loaned to her father, John Barneson, the aggregate sum of $150,-000 in cash. At or about the same time, taxpayer's mother, Harriet E. Barneson, also loaned a like amount in cash to John Barneson.

"John Barneson died February 25, 1941. His estate is now in process of probate in the Superior Court of the State of California in and for the County of San Mateo, No. 9360 in the files of said court.

"This debt of $150,000 was, on the date of John Barneson's death, and at all other times since it was incurred, evidenced by a loan account on his books of account; taxpayer, Muriel Barneson, has never kept books of account.

"Following the death of John Barneson, and within the time provided by law for the filing of claims against his estate, the taxpayer, acting through her guardian, presented her written and verified claim for said debt of $150,000. On June 23, 1941, Hon. A. R. Cotton, Judge of the Superior Court, rejected said claim. The ground or basis of rejection was that it was barred by the statute of limitations. Taxpayer's guardian was informed of such rejection on the date thereof, or at least within a few days thereafter, and thereupon made a mental 'charge off' of the debt, and determined to take a deduction therefor, as for a bad debt, on the income tax returns of his ward for the calendar year 1941. (Said guardian is also Executor of the Estate of John Barneson.) See attached affidavit of Martin Weil, attorney for Estate of John Barneson.

"The debtor, John Barneson, at all times possessed the requisite financial ability to pay this debt and likewise the $150,000 borrowed from taxpayer's

mother. Nevertheless, in order to have done so, it would have been necessary for him to sell securities at what for many years during the depression seemed like less than true or fair values. This would also have had the effect of reducing substantially John Barneson's future income, which was not in excess of his expenses, which were very large. Consequently, neither the taxpayer nor her mother, who died April 14, 1936, ever pressed John Barneson for payment; each of them had far more than ample income for current needs, and no inconvenience resulted from the delay of John Barneson in repaying. Nevertheless, there was never any intention on the part of either creditor to forgive the indebtedness or any part thereof. Nor would John Barneson ever have accepted a forgiveness of the debts. This is shown by the fact that subsequent to the death of his wife, John Barneson, on April 27, 1937, discharged his debt of $150,000 to her estate in full, notwithstanding the debt was barred by the applicable California statute of limitations. Said obligation of $150,000 was reported at its full face value as Item 5 on Schedule F of Form 706 filed by the Estate of Harriet E. Barneson, on which the total federal estate tax liability, as later determined by the Board of Tax Appeals, was $665,609.19. It is obvious that if John Barneson had desired to invoke the statute of limitations as a defense against collection by the Estate of Harriet E. Barneson of the indebtedness of $150,000 to Harriet E. Barneson (indebtedness of like

amount to that which he owed Muriel Barneson and incurred at the same time and for similar reasons), a very large reduction in the federal estate tax liability of the Estate of Harriet E. Barneson could have been effected.

"The writer (Lionel T. Barneson) was in very close contact with John Barneson, especially during the latter years of his life, and knows that if John Barneson had thought for one moment that his debt to Muriel Barneson would not be paid to her by his estate, he would have paid it during his lifetime, as he could have done by selling, or transferring to Muriel, securities of a value of $150,000.

"The writer is advised by counsel that because the debt to Muriel Barneson cannot be paid, it is not deductible in determining the net estate of John Barneson for federal estate tax purposes. See Estate of Pryor Brown, deceased, v. United States, Court of Claims, March 3, 1941, CCH Inheritance, Estate and Gift Tax Service (Federal), paragraph 10,035 and 1941 Prentice-Hall, paragraph 62,499. The result is that a large estate tax is payable on this $150,000—on the 'top' of John Barneson's estate—whereas at any time prior to his death John Barneson could have paid the debt without any tax liability of any kind, either to himself or to Muriel Barneson.

"The writer is also advised, however, that Muriel Barneson is entitled to a bad debt deduction of $150,000 under the doctrine of the Circuit Court of Appeals for the Ninth Circuit in Commissioner

v. Burdette, 69 F.(2d) 410, 13 AFTR 702 (1934), which likewise involved a California debtor."

The affidavit of Martin Weil, referred to in the fifth paragraph of the statement of Lionel T. Barneson, quoted above (see page 6, line 3 above) reads as follows:

"I am a member of the State Bar of California and am engaged in the active practice of law with offices in the Higgins Building, Los Angeles, California. I am the attorney for the Estate of John Barneson, who died February 25, 1941, and whose estate is now in process of probate in the Superior Court of the State of California, in and for the County of San Mateo, No. 9360 in the files of said court. Lionel T. Barneson, 256 Montgomery Street, San Francisco, is the executor.

"Prior to June 23, 1941, it came to my attention that the decedent was, at the date of his death, indebted, as shown by his books of account, in the amount of $150,000.00 to his daughter, Muriel Barneson, for loans made in cash on May 8, 1928, in the amount of $100,000.00, and on May 15, 1929, in the amount of $50,000. Lionel T. Barneson is also guardian of the person and estate of the aforesaid Muriel Barneson, an Incompetent Person, and as such fiduciary, prepared a creditor's claim against the Estate of John Barneson, in the amount of $150,000.00 As attorney for said estate, I deemed it my duty to bring to the attention of the probate court (Honorable A. R. Cotton, Judge) the fact that in my opinion the payment of said

claim was barred by the statute of limitations. I did this in chambers on June 23, 1941, and thereupon Judge Cotton rejected the claim by an endorsement to that effect thereon.

"The purpose of this affidavit is to state that I know of my own knowledge that the ground of rejection was the statute of limitations, and no other."

Aside from the deduction of said $150,000.00 as a bad debt in her return for the calendar year 1941, plaintiff has never claimed any deduction with respect to the whole or any part thereof in any other taxable year; nor has the Commissioner ever allowed any deduction in any taxable year with respect thereto.

11. Plaintiff's income tax return for the calendar year 1941 was in due course examined by an Examining Officer acting under F. M. Harless, Internal Revenue Agent in Charge at San Francisco, California. Said Examining Officer made a report asserting a deficiency of $70,388.20 in plaintiff's income tax for the calendar year 1941. Plaintiff thereafter duly filed a written and verified protest against said asserted deficiency and conference was had between representatives of the plaintiff and a member of the Conference Section of the Office of the Internal Revenue Agent in Charge at San Francisco. Subsequently, the Commissioner of Internal Revenue (hereinafter referred to as the Commissioner), acting by and through the aforesaid F. M. Harless, Internal Revenue Agent in Charge, mailed

to the plaintiff notice of his final determination of plaintiff's federal income tax liability for the calendar year 1941, which notice was dated June 25, 1945, and asserted a deficiency of $70,369.97. Said asserted deficiency was based upon six adjustments, which were set forth in the statement attached to the aforesaid final notice of deficiency as follows:

"ADJUSTMENTS TO NET INCOME"

"Net income (loss) disclosed by return		$(29,901.15)
Unallowable deductions and additional income:		
(a) Bad debt	$150,000.00	
(b) Rents and royalties	4,441.11	
(c) Long-term capital gain	585.43	
(d) Fiduciary income	2,745.17	
(e) Dividends	31.99	157,803.70
Total		$127,902.55
Nontaxable income and additional deductions:		
(f) Guardianship fees		3,000.00
Net income adjusted		$124,902.55"

Plaintiff does not contest the correctness of the Commissioner's adjustments (c), (e) and (f) above but does challenge adjustment (a) in its entirety and adjustments (b) and (d) in part.

12. The increase of $2,745.17 made by the Commissioner in plaintiff's fiduciary income—adjustment (d) in paragraph 11 above—resulted in part from increases made by the Commissioner in the net income of the testamentary trust created by the will of plaintiff's mother, Harriet E. Barneson, who died April 14, 1936, and in which net income plaintiff's distributive share was 25%. The Commissioner determined that the correct amount of

net income of said testamentary trust distributable to its beneficiaries was $63,511.22 and that plaintiff's share thereof was $15,877.80. In determining said net income of $63,511.22 the Commissioner disallowed as a deduction interest paid by the trustee of said testamentary trust during the calendar year 1941 in the amount of $6,311.68, said disallowance being explained in the statement which accompanied the Commissioner's final notice of deficiency dated June 25, 1945 (see paragraph 11 above), as follows:

"(A) Deduction of $6,311.68 claimed for interest paid by the trust during the taxable year on additional federal estate taxes and state inheritance taxes assessed against the estate of Harriet E. Barneson, deceased, is disallowed. Since the additional estate and inheritance taxes were not a direct liability of the trust, it is held that the interest on such additional taxes, paid by the trustee as transferee of assets of the estate, does not constitute an allowable deduction to the trust for income tax purposes."

At all material times the books of account of said testamentary trust were kept, and its fiduciary income tax returns were made, on the basis of cash receipts and disbursements, and plaintiff's income tax return for the calendar year 1941 was filed on that basis. The Commissioner, in determining the asserted deficiency of $70,369.97, also used the cash basis. The item of interest of $6,311.68 referred to above is made up as follows:

(a) On or shortly after July 15, 1941, the trustee paid an additional federal estate tax of $19,856.62, together with interest thereon in the amount of $4,765.59 (calculated from July 14, 1937, the date on which interest commenced to run, to July 14, 1941). $271.37 was allocated to the period between July 14, 1937, and October 4, 1937, the date of the decree of distribution, and the remainder, $4,494.22, was allocated to the period from October 5, 1937, to July 14, 1941.

(b) On August 27, 1941, the trustee made a further payment of federal estate tax in the amount of $1,466.48, together with interest in the amount of $362.47, covering the period from July 14, 1937, to August 27, 1941. $20.04 was allocated to the period from July 14, 1937, to October 4, 1937, and $342.43 to the period commencing with the date of the decree of distribution.

(c) On September 22, 1941, the trustee paid an additional California inheritance tax of $4,620.59, together with interest of $1,116.77 thereon for the period from April 14, 1938, to the date of payment.

(d) On or about July 2, 1941, the trustee paid an additional California income tax of the decedent for the period January 1, 1936, to April 14, 1936, the date of death, together with interest of $66.85 covering the period from April 15, 1937, to July 2, 1941.

Out of the total interest payments made by the testamentary trust during the calendar year 1941, namely, $6,311.68, the portion which accrued after

October 4, 1937, the date of the decree of distribution, was $6,016.88, and said amount was properly deductible, as interest paid on indebtedness, in determining the net income of said trust for the calendar year 1941 and in determining the net income distributable to beneficiaries. If said amount of $6,016.88 had been allowed as a deduction in determining the net income and distributable net income of said trust, the amount by which plaintiff's income from fiduciaries would have been increased by the Commissioner would have been $1,240.85 instead of $2,745.17. The correct amount of plaintiff's income from fiduciaries was $15,-432.48 ($14,191.23, as reported in plaintiff's return, plus $1,240.85).

13. Plaintiff, in her return for the taxable year 1941, reported income from rents and royalties in the amount of $15,708.47 (Item 5 of Form 1040; paragraph 9 above), and explained how she arrived at said amount of $15,708.47 in a detailed schedule of receipts and deductions attached to said return. The Commissioner, in his final determination, increased said income from rents and royalties in the amount of $4,441.11, said increase (insofar as plaintiff alleges it to be erroneous) being explained in the statement which accompanied the final notice of deficiency dated June 25, 1945 (see paragraph 11 above) as follows:

"(b) Deductions claimed in connection with rental income and royalties are decreased by $4,441.11 as follows:

(1)	Taxes disallowed	$ 833.26
(2)	Social security taxes, penalties and interest thereon disallowed	1,324.11
(3)	Depreciation on rental properties decreased	1,706.92
(4)	Depreciation on oil lease properties decreased	576.82
	Total decrease in deductions	$4,441.11

"(1) Muriel E. Barneson acquired an undivided 1/6 interest in certain real properties and a Union Pacific oil lease when the real properties and the lease were distributed to her and other members of the Barneson family as tenants in common by the Oakburn Corporation upon its dissolution in 1938.

"Subsequent thereto Muriel E. Barneson acquired a life interest in an additional 1/6 share in the aforementioned real properties and oil lease under the terms of the will of John Barneson who died 25 February 1941.

"Taxes claimed as applicable to the 1/6 share of the real properties and the oil lease held in life tenancy are decreased by $833.26 as follows:

	Claimed	Adjusted	Decrease
For fiscal year ended 30 June 1940	$ 510.22	$ None	$510.22
For fiscal year ended 30 June 1941	697.21	None	697.21
For fiscal year ended 30 June 1942	2,064.56	2,438.73	(374.17)
Totals	$3,271.99	$2,438.73	$833.26

"Taxes for the fiscal years ended 30 June 1940

and 30 June 1941 assessed against the portion of the real properties and the oil lease held in life tenancy are disallowed since such taxes accrued prior to the death of John Barneson and do not, therefore, represent the liability of Muriel E. Barneson. Taxes for the fiscal year ended 30 June 1942 are allowed in full since they accrued subsequent to the death of Mr. Barneson."

The Commissioner's purported factual determination that "Subsequent thereto Muriel E. Barneson acquired a life interest in an additional 1/6 share in the aforementioned real properties and oil lease under the terms of the will of John Barneson who died 25 February 1941" is not true; said life interest in said properties was acquired by plaintiff under the will of her mother, Harriet E. Barneson, who died April 14, 1936. The taxes on said properties for the fiscal years ended June 30, 1940 and June 30, 1941, in the amounts of $510.22 and $697.21, respectively, represented the tax liabilities of plaintiff.

14. On June 28, 1945, plaintiff paid to defendant, as Collector of Internal Revenue for the First District of California, the sum of $70,369.97, as federal income tax asserted by the Commissioner to be owing by plaintiff for the calendar year 1941. At the time said payment was made to the defendant, however, said defendant was given written notice that plaintiff contended that she had no income tax liability whatever for the calendar year 1941; that the amount of said asserted tax, to wit,

$70,369.97, and any interest thereon which might subsequently be paid by plaintiff, were paid under protest; and that plaintiff reserved all rights to file a claim for refund for the entire amount paid and in the event said claim was rejected, in whole or part, to bring suit to recover against said defendant or the United States, as the plaintiff might later be advised. Defendant acknowledged receipt of said written protest on June 28, 1945. Subsequently, defendant issued a notice and demand on plaintiff for the payment of interest in the amount of $13,872.52 on the aforesaid asserted tax deficiency of $70,369.97, and, pursuant to said demand, plaintiff paid to the defendant, as interest, asserted by defendant to be due from plaintiff, the sum of $13,872.52 on or about October 23, 1945.

15. Within the time and in the manner provided by law, plaintiff filed with defendant on Form 843 of the Treasury Department Internal Revenue Service, a claim for refund, duly executed and verified, in which plaintiff demanded a refund of the sum of $70,369.97 tax paid by her on June 28, 1945, and of the sum of $13,872.52 interest paid by her on or about October 23, 1945, as alleged in paragraph 14 above. Said claim for refund set forth, as grounds thereof, the facts hereinabove alleged with respect to the aforesaid bad debt of $150,000.00, with respect to income from fiduciaries, and with respect to income from rents and royalties.

16. More than six months have expired since the filing of said claim for refund. The Commissioner has failed to render a decision on said claim.

17. The failure to allow said claim for refund, as above described, was erroneous and contrary to the provisions of the Internal Revenue Code.

18. There is now owing from defendant to plaintiff the sum of $84,242.49 (tax of $70,369.97 and interest of $13,872.52) unrefunded overpayment of tax and interest, with interest on said sum as provided by law.

19. This is a suit of a civil nature at common law which arises under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue.

Wherefore, plaintiff prays judgment against defendant in the sum of $84,242.49 for said taxes and interest erroneously and illegally collected and not refunded, together with interest as provided by law, the costs of this suit, and for such other and further relief as may be just and proper in the premises.

BRADY & NOSSAMAN,
By /s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAMAN,
/s/ JOHN O. PAULSTON,
/s/ JAMES L. WOOD,
Attorneys for Plaintiff.

EXHIBIT A

In the Superior Court of the State of California,
In and For the County of Ventura

No. 19341

LETTERS OF GUARDIANSHIP

In the Matter of the Estate and Guardianship of MURIEL ELFRIDA BARNESON, an incompetent person.

State of California,
County of Ventura—ss.

Lionel T. Barneson is hereby appointed guardian of the person and estate of Muriel Elfrida Barneson an incompetent person.

Witness: L. E. Hallowell, Clerk of the Superior Court of the County of Ventura, with the seal of the Court affixed, the 3rd day of April 1936.

L. E. HALLOWELL
Clerk

[Seal] By J. G. HATHAWAY
Deputy Clerk

State of California,
County of Ventura—ss.

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully perform the duties of my office as Guardian of the

person and estate of Muriel Elfrida Barneson, an incompetent person, according to law.

LIONEL T. BARNESON

Subscribed and sworn to before me this 3rd day of April 1936

[Seal] CHAS. F. BLACKSTOCK,

Notary Public in and for said county and state.

State of California,
County of Ventura—ss.

I, L. E. Hallowell, County Clerk of the County of Ventura, State of California, and ex-officio Clerk of the Superior Court in and for said county, hereby certify that the within and foregoing is a full, true and correct copy of Letters of Guardianship issued in the therein entitled matter, as the same remain of record and on file in my office. I further certify that said Letters have not been revoked, but are still in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 19th day of February 1948.

L. E. HALLOWELL
County Clerk
[Seal] By /s/ IRENE VAN FOSSEN
Deputy Clerk

[Endorsed]: Filed Superior Court April 3, 1936.

State of California,
County of Los Angeles—ss.

Lionel T. Barneson, as Guardian of the Person and Estate of Muriel E. Barneson, also known as Muriel Elfrida Barneson, An Incompetent Person,

being by me first duly sworn, deposes and says: that he is the Plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ LIONEL T. BARNESON,

As Guardian of the Person and Estate of Muriel E. Barneson, also known as Muriel Elfrida Barneson, An Incompetent Person.

Subscribed and sworn to before me this 18th day of February, 1948.

[Seal] /s/ JULIA M. FITZSIMMONS,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Feb. 17, 1952.

[Endorsed]: Filed U.S.D.C. Feb. 25, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now James G. Smyth, Collector of Internal Revenue for the First District of California, defendant herein, by his attorney, Frank J. Hennessy, United States Attorney in and for the Northern District of California, for his answer to the complaint of the plaintiff, admits, denies and alleges as follows:

I.

The allegations contained in paragraphs 1, 2 and 3 of the complaint are admitted.

II.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 4 of the complaint.

III.

The allegations contained in paragraph 5 of the complaint are denied, except it is admitted that John Barneson died February 25, 1941, and his estate was probated in the Superior Court of the State of California in and for the County of San Mateo, Case No. 9360 in the files of said court.

IV.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 6 of the complaint.

V.

The allegations contained in paragraph 7 of the complaint are denied, except it is admitted that upon the death of the said John Barneson plaintiff filed a claim against his estate for an alleged indebtedness resulting from purported loans from plaintiff to said John Barneson of $100,000 on May 8, 1928, and $50,000 on May 15, 1929, and except that the said purported claim was rejected by the Honorable H. R. Cotton, Judge of the Superior Court of the State of California, in and for the County of San Mateo on June 23, 1941; and that plaintiff had not and did not bring suit on said claim.

VI.

The allegations contained in paragraph 8 of the complaint are denied.

VII.

The allegations contained in paragraph 9 of the complaint are admitted; for further answer to said paragraph 9 defendant denies that the return of income as filed contained a correct statement of plaintiff's income and deductions for the year 1941.

VIII.

The allegations contained in paragraph 10 of the complaint are denied, except it is admitted that in her income tax return as filed for the year 1941 as item 15, plaintiff took and claimed as a deduction the amount of $150,000 and it is further admitted that there was attached to said return, as filed, a written statement in which plaintiff purported to justify the $150,000 as a bad debt deduction; and except it is further admitted that plaintiff has not claimed or the Commissioner of Internal Revenue allowed any part of said claimed $150,000 in any other year.

IX.

The allegations contained in paragraph 11 of the complaint are admitted.

X.

The allegations contained in paragraphs 12 and 13 of the complaint are denied.

XI.

The allegations contained in paragraph 14 of the

complaint are denied, except it is admitted that plaintiff paid to the defendant on July 28, 1945, and not June 28, 1945, as alleged, the sum of $70,369.97, federal income tax determined by the Commissioner of Internal Revenue to be due and owing by her for said year 1941; that a further payment of interest in the amount of $13,872.32 on the aforesaid deficiency was made on October 18, 1945, and not October 25, 1945, as alleged.

XII.

The allegations contained in paragraph 15 of the complaint are denied, except it is admitted that plaintiff filed with the defendant on Form 843, a claim for refund of $70,369.97 tax, and $13,872.52 interest, all within the time and manner provided by law.

XIII.

The allegations of paragraphs 16 and 19 of the complaint are admitted.

XIV.

The allegations of paragraphs 17 and 18 of the complaint are denied.

Wherefore, having fully answered, defendant prays that defendant's suit be dismissed, for his costs and all other proper relief.

/s/ FRANK J. HENNESSY,
U. S. Attorney,
Attorney for the Defendant.
/s/ WILLIAM E. LICKING,
Asst. U. S. Atty.

[Endorsed]: Filed May 11, 1948.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts may be taken as true for the purposes of this case, subject to the right of either party to introduce other or further evidence not inconsistent therewith and subject further to the right of either party to object thereto on any ground other than the mode of proof:

1. Lionel T. Barneson is, and at all times since April 3, 1936, has been, the duly appointed, qualified and acting guardian of the person and estate of Muriel E. Barneson, also known as Muriel Elfrida Barneson, an incompetent person, plaintiff herein. Plaintiff is the daughter of John Barneson, who was born in 1862 and died February 25, 1941, and Harriet E. Barneson, his wife, who died April 14, 1936. John and Harriet had three other children, J. Leslie Barneson and Lionel T. Barneson, who are still living, and Harold J. Barneson, who died February 7, 1945. Throughout the entire period of time between the years 1928 and 1941, both inclusive, plaintiff was a person of great wealth. Said wealth was derived originally from gifts to plaintiff from her father and her mother. At all times material hereto, John, Harriet and Muriel Barneson were residents of, and domiciled in, the State of California.

2. At all times hereinafter mentioned, plaintiff Muriel E. Barneson, and the guardian of her person and estate, Lionel T. Barneson, were, and still are, citizens of the United States, domiciled in the State of California.

3. Defendant is, and at all times since May 14, 1945, has been, the duly appointed and acting Collector of Internal Revenue for the First District of California.

4. Prior to July 1, 1927, Harold J. Barneson carried on a general stock and bond brokerage business in copartnership with one Clarence S. Streeter. Said copartnership was dissolved as of July 1, 1927, said Barneson acquiring by purchase all of the interest of said Streeter in the said partnership property. Under date of February 9, 1928, Harold J. Barneson (as H. J. Barneson) entered into a written agreement of copartnership with James D. Kennedy of Los Angeles and C. R. Stevens of San Francisco under which said parties became, effective as of July 1, 1927, copartners in the stock and bond brokerage business in the cities of Los Angeles and San Francisco under the name and style of "H. J. Barneson & Co." H. J. Barneson contributed to the partnership certain exchange memberships of an agreed value of $319,200.00, together with other property of an agreed value of $109,843.85, and agreed to contribute in addition the sum of $270,956.15 out of profits. Kennedy and Stevens each agreed to contribute $150,000.00 out of profits. Said copartnership agreement provided that net

profits should be divided 70% to H. J. Barneson, 15% to Kennedy, and 15% to Stevens. On November 1, 1928, H. de La Chapelle was added to the partnership. Stevens and La Chapelle retired from the partnership as of December 31, 1929, and effective January 1, 1930, a new partnership under the name of H. J. Barneson & Co. was formed, consisting of H. J. Barneson, James D. Kennedy, J. Leslie Barneson and M. Eyre Pinckard, as general partners, and John Barneson, as limited partner. Subsequently, in December, 1930, the firms of H. J. Barneson & Co. and Walsh, O'Connor & Co. consolidated their brokerage business in a new partnership. The general partners were Kenneth Walsh, George R. O'Connor, Cliff M. Weatherwax, Arthur N. Earll, R. M. Marshall, Eric L. Pedley, H. J. Barneson, J. Leslie Barneson and James D. Kennedy. The limited partners were Edward M. Walsh and John Barneson. The firm of Walsh, O'Connor & Barneson discontinued business on February 20, 1932, and was liquidated. See 38 B.T.A. at 371.

5. In October, 1927, Harold J. Barneson needed to borrow money with which to conduct his stock brokerage business. In that month, in order to obtain collateral upon which he could borrow money from the banks, Harold borrowed 5,000 shares of Standard Oil Company of New York from his father, John Barneson, and 5,000 shares of Standard Oil Company of New York from the Oakburn Company, a holding company one-sixth of the stock of which was owned by each of the six members of

the Barneson family. The need for additional working capital increasing still further, Harold Barneson, in the months of April and May, 1928, asked for and received from John Barneson cash in the aggregate sum of $300,000.00, of which sum John Barneson obtained $100,000.00 from his wife, Harriet E. Barneson, and $100,000.00 from his daughter, Muriel. In 1929, Harold desired additional sums of money and John Barneson, in the months of May and July, 1929, supplied Harold with an aggregate of $125,000.00, of which John Barneson obtained $50,000.00 from Muriel in May, and $50,000.00 from Harriet in July. Of the total of cash funds transferred by John Barneson to Harold in 1928 and 1929 ($300,000.00 in 1928 and $125,000.00 in 1929) $150,000.00 was supplied by Harriet, $150,000.00 by Muriel, and the remaining balance came from moneys which were theretofore the property of John Barneson. Harold Barneson's understanding of his obligations with respect to the aforesaid $425,000.00 was stated in a letter dated December 5, 1929, which he wrote his father on the letterhead of H. J. Barneson & Co. and which is reproduced below:

"Captain John Barneson,
Summerholme,
Burlingame, California.

Dear Dad:

This is to acknowledge that, in addition to $100,000 received from you April 12th, 1928, and $200,-

000 received from you May 9th, 1928, on which total of $300,000 I have previously agreed to pay you 7½% of the net profits of H. J. Barneson & Company, a co-partnership, I also received the following:

On May 31st, 1929	$50,000.00
On July 15th, 1929	25,000.00
On July 24th, 1929	50,000.00
	$125,000.00

On this total of $125,000.00 I agree to pay 3⅛% of the net profits of H. J. Barneson & Company. This is the same ratio as the payment on the $300,000 above referred to and makes a total participation of 10⅝% for the total amount advanced, $425,000.00.

The other partners in the firm have acquiesced in writing to this agreement.

Your affectionate son,

/s/ HAROLD.
/s/ H. J. BARNESON."

HJB-E

On January 1, 1930, J. Leslie Barneson became a general partner in H. J. Barneson & Co. Leslie's contribution to the partnership capital was recited in the partnership agreement to be $150,000.00, which he obtained from his father and which was a part of or derived from whatever rights were possessed by John Barneson as a result of his transfer of the aforesaid $425,000.00 to Harold J. Barneson. The contribution of John Barneson to the

partnership was recited in the partnership agreement to be $275,000.00, which was the excess of the aforesaid $425,000.00 over the sum of $150,000.00 assigned to Leslie in exchange for Leslie's demand note for $150,000.00 dated January 1, 1930, payable to John Barneson.

6. At all times material hereto, John Barneson kept double-entry books of account. Said books contain an account payable entitled, "Muriel E. Barneson Loan a/c", a photostat copy of which is attached hereto as Exhibit A. This account contains two items only, both credits, namely, May 8, 1928, journal entry 2368A, in the amount of $100,000.00; May 15, 1929, cash in the amount of $50,000.00; balance, $150,000.00. Said books also contain another and different account with Muriel entitled "Muriel E. Barneson". This account contains numerous debits and credits; photostats of two pages of this account, covering the periods between January 24, 1926, and December 27, 1928, and between December 31, 1928, and December 3, 1931, are attached hereto as Exhibits B and B-1, respectively. (The Muriel E. Barneson mentioned in the two aforesaid accounts and elsewhere in this Stipulation is the plaintiff herein.)

7. On April 3, 1928, Muriel E. Barneson wrote her check, No. 443, on the Bank of California National Association, San Francisco, to the order of John Barneson in the amount of $25,000.00. Said check was endorsed by John Barneson and was paid to him by said bank (in which he also had an

account) on April 12, 1928. The aforesaid "Muriel E. Barneson" account (Exhibit B) contains a credit entry of $25,000.00 under date of April 12, 1928, representing the cash transferred by the aforesaid check dated April 3, 1928. A photostat copy of said check (front and back) and of the stub thereof are attached hereto as Exhibit C.

8. On May 8, 1928, Muriel E. Barneson wrote another check, No. 444, on The Bank of California National Association, San Francisco, to the order of John Barneson in the amount of $105,000.00, a photostat copy of which (front and back) and of the stub thereof are attached hereto as Exhibit D. Said check was endorsed by John Barneson and was paid to him by said bank on May 8, 1928. The aforesaid "Muriel E. Barneson" account (Exhibit B) contains a credit entry of $105,000.00 under date of May 8, 1928, representing the cash transferred by the aforesaid check dated May 8, 1928. Said "Muriel E. Barneson" account also contains a debit entry under date of May 8, 1928, recording "Transfer to Loan a/c" of $100,000.00 out of the then credit balance of said "Muriel E. Barneson" account by journal entry 2368A. The "Loan a/c" referred to in the immediately preceding sentence is the aforesaid "Muriel E. Barneson Loan a/c" (Exhibit A). On May 23, 1928, John Barneson wrote a check to Muriel E. Barneson in the amount of $35,356.76, the amount of the then credit balance in the "Muriel E. Barneson" account, and a debit entry of that date of $35,356.76 balanced said account.

9. On May 14, 1929, Muriel E. Barneson wrote her check, No. 378, on The Bank of California National Association, San Francisco, to the order of John Barneson in the amount of $50,000.00, a photostat copy of which (front and back) and of the stub thereof (which bears No. 377) are attached hereto as Exhibit E. Said check was endorsed by John Barneson and was paid to him by said bank on May 14, 1929. The amount of said check was credited to the "Muriel E. Barneson Loan a/c" (Exhibit A) under date of May 15, 1929. The words on said stub which appear below the words "Pay John Barneson" are in Muriel's handwriting in pencil and are "I think H J B Partnership".

10. John Barneson's aforesaid books of account also contain an account entitled, "Harriet E. Barneson Loan a/c", a photostat copy of which is attached hereto as Exhibit F. (The Harriet E. Barneson therein referred to was the wife of John Barneson and is the same person as the Harriet E. Barneson mentioned elsewhere herein.) Said account contains two credit items, namely May 8, 1928, in the amount of $100,000.00; July 22, 1929, $50,000.00. Such was the condition of said account on the date of death of Harriet E. Barneson, to wit, April 14, 1936. Said $150,000.00 balance was fully paid to Harriet's estate by John Barneson on April 27, 1937, and appropriate entries were made on the debit side of said account. (See Exhibit F.)

11. John Barneson's aforesaid books of account contain an account that was originally entitled

"Special Partnership—H. J. Barneson & Co.", above which original title there was subsequently written—following the organization of Walsh, O'Connor & Barneson in December, 1930—the words, "Walsh, O'Connor & Barneson, successors to", so that the account was entitled, subsequent to December, 1930, as follows:

Walsh, O'Connor & Barneson
Successors to

Special Partnership—H. J. Barneson & Co.

A photostat copy of said account is attached hereto as Exhibit G.

12. In the month of July, 1928, John Barneson received the first return or income on the $300,000.00 which he had transferred to Harold during the months of April and May, 1928, as related above. On July 25, 1928, John Barneson received a return or income of $17,917.28, and on the same date he paid $5,972.42 to Harriet and an identical sum to Muriel. On October 13, 1928, John Barneson received from the same source the sum of $15,377.78, and on the same date he paid $5,125.93 to Harriet and an identical sum to Muriel. The total return or income which Muriel received during the calendar year 1928 with reference to the $100,000.00 which she transferred to John Barneson in April or May, 1928, as related above, was $11,098.35 ($5,972.42 plus $5,125.93).

13. Muriel's Federal Income Tax Return for 1928 reported said $11,098.35 as Item 4; the printed

form of return (Form 1040) called for "4. Income from Partnerships. (State name and address)." In the space provided on the tax return form for the insertion of "name and address" of the "Partnerships," there appears in typewriting the words: "H. J. Barneson & Co., San Francisco". The $11,098.35 which Harriet received during 1928 with reference to the $100,000.00 which she transferred to John Barneson, as related above, was reported on Harriet's 1928 Federal Income Tax Return in identically the same manner as the $11,098.35 received by Muriel was reported.

14. In the month of July, 1929, John Barneson received a return or income on the $425,000.00 which he had transferred to Harold during April and May, 1928, and May and July, 1929, as related above. On July 23, 1929, John Barneson received a return or income of $44,162.88, and on the same date he paid $14,720.96 to Harriet and an identical sum to Muriel. Muriel's 1929 Federal Income Tax Return contains an item (Item 5, Form 1040) reading as follows: "5. Income from Partnerships. (State name and address) H. J. Barneson & Co., San Francisco, $14,720.96". Harriet's 1929 return is identical to Muriel's insofar as Item 5 is concerned.

15. Muriel was never named as a partner, general or limited, in any written partnership agreement of any partnership called H. J. Barneson & Co. or Walsh, O'Connor & Barneson; nor was

Harriet. John was never named as a partner, general or limited, in any written partnership agreement of any partnership called H. J. Barneson & Co. or Walsh, O'Connor & Barneson until he was named as a limited partner in the articles of partnership of H. J. Barneson & Co. as of January 1, 1930. The articles of partnership of the partnerships called H. J. Barneson & Co. and Walsh, O'Connor & Barneson expressly prohibit the partners thereof, general and limited, from assigning all or any part of their interests therein. The records of the New York Stock Exchange do not show that Muriel, Harriet or John Barneson was a member, general or limited, of any partnership named H. J. Barneson & Co. or Walsh, O'Connor & Barneson, except that John Barneson became a limited partner of H. J. Barneson & Co. as of January 1, 1930, and became a limited partner in Walsh, O'Connor & Barneson on its formation in December, 1930.

16. Neither Muriel nor Harriet received any return or income during the calendar year 1930 from or with respect to the $150,000.00 which each transferred to John Barneson during 1928 and 1929 as related above. During the calendar year 1930 John Barneson received no return or income from or with respect to the $425,000.00 which he transferred to Harold as related above.

17. The Articles of Limited Partnership of Walsh, O'Connor & Barneson, dated December 13, 1930, contained the following provisions, among others:

"Ninth: * * * Each of the general partners devoting all or part of his time to the partnership business shall be paid a salary, the amount and time and manner of payment of which shall be fixed from time to time by a two-thirds majority in interest of the general partners. Such salaries shall be considered as an expense of the business and shall be paid before interest on capital contributions and before distribution of profits, but after the interest on partners' loans.

"Tenth: After payment of expenses of the business, including interest on loans of partners, and partners' salaries, all profits of the partnership shall be paid and applied as follows and in the following order of priority:

"a. On or before the 10th day of each calendar month each of the limited partners shall be paid the sum of $1500. Should the profits for any month be insufficient to pay said sums, then any deficiency shall be cumulative, but without interest, and shall be paid from subsequent profits before the general partners are entitled to share therein.

"b. Each of the general partners shall be paid interest at the rate of five per cent per annum on his net capital contribution, the same to be paid or credited at the end of each calendar month. Should the profits for any month be insufficient to pay the interest on net capital contributions, then any deficiency shall be cumulative, but without interest, and shall be paid without interest from subsequent profits before any further division of partnership profits.

"c. The balance of the profits, if any, shall be divided among the partners as follows:

Kenneth Walsh	21½ per cent
George R. O'Connor	16 per cent
Cliff M. Weatherwax	5 per cent
Arthur N. Earll	3½ per cent
R. M. Marshall	2 per cent
Eric L. Pedley	2 per cent
H. J. Barneson	27½ per cent
J. Leslie Barneson	7½ per cent
James D. Kennedy	7½ per cent
Edward M. Walsh	0 per cent
John Barneson	7½ per cent

"Profits shall be ascertained on the 30th day of June and the 31st day of December of each year. Any profits ascertained as of the 30th day of June for division according to said percentages shall be credited to the partners' accounts, but, unless otherwise decided by a two-thirds majority in interest of the general partners, shall not be disbursed, nor drawn against by any partner until after the completion of the annual audit as of December 31.

"The said percentages shall determine the respective interests of the partners."

18. During the calendar year 1931 John Barneson received eleven monthly payments, totalling $14,200.00, from Walsh, O'Connor & Barneson as a return or income on the $275,000.00 referred to in paragraph 5 of this Stipulation. The checks of the firm were transmitted by letters addressed to John

Barneson in Hillsborough, California (where he lived), and signed by the firm's Cashier in Los Angeles; the letter of April 30, 1931, is fairly typical and describes the check as "representing partner's compensation for the month of April 1931." On or within a few days after the dates upon which John Barneson received such "partner's compensation" from Walsh, O'Connor & Barneson, John Barneson made payments to Harriet and Muriel totalling $5,163.80 each as a return or income on the $150,000.00 which each of them had transferred to him in 1928 and 1929 as aforesaid. Muriel's 1931 Federal Income Tax Return, which was made on Treasury Form 1040, contains nothing as Item 5, "Income from Partnerships", but does include the sum of $4,363.80 which she received in 1931 from John Barneson as Item 1, which is described in the printed portion of Form 1040 as "1. Salaries, Wages, Commissions, etc. (State name and address of employer)". In the space which said Form 1040 provides for insertion of the name of the employer, said return shows in typewriting the following: "Walsh, O'Connor & Barneson—$4,363.80." The payments which Muriel received from John Barneson during the eleven months, January to November, 1931, both inclusive, varied from a low of $272.75 (in January) to a high of $545.50 (in February, March and April) and aggregated $5,163.80. The difference between that amount and the amount of $4,363.80 reported on her 1931 return, namely, $800.00, was the aggre-

gate of the two payments of $400.00 each which Muriel received from John Barneson on October 7, 1931, and November 2, 1931, following John's receipt of "partner's compensation" for the months of September and October, 1931. John Barneson's books of account contain a journal entry under date of December 30, 1931, reading as follows:

"Harriet E. Barneson	800.00	
Muriel E. Barneson	800.00	
Compensation	600.00	
Suspense		2,200.00

To reverse compensation for Sept. & October paid by Walsh, O'Connor & Barneson in error, as not earned. This amount to be refunded."

Under date of January 2, 1932, John Barneson made said refund to Walsh, O'Connor & Barneson by his check No. 4569 in the amount of $2,200.00. The aforesaid Muriel E. Barneson account on John Barneson's books contains a debit entry under date of December 30, 1931, in the amount of $800.00, with the explanation "Compensation Refund." Thus the gross and net amounts which Muriel received from John Barneson during 1931 as "compensation" were $5,163.80 and $4,363.80, respectively (Exhibit B-1). Muriel was never at any time an employee of Walsh, O'Connor & Barneson.

19. Harriet's 1931 Federal Income Tax Return, like Muriel's, was made on Treasury Form 1040, and was a separate return. The net aggregate of $4,363.80, which Harriet, like Muriel, received from

John Barneson in 1931 following his receipt of "partner's compensation" from Walsh, O'Connor & Barneson, was reported as Item 1 income as follows:

"1. Salaries, Wages, Commissions, etc. (State name and address of employer) Walsh, O'Connor and Barneson	$4,363.80	
Less one-half reported by John Barneson	2,181.90	$2,181.90"

Harriet was never at any time an employee of Walsh, O'Connor & Barneson.

20. In 1932 there was only one payment made by Walsh, O'Connor & Barneson to John Barneson, and only one payment by John Barneson to Muriel and to Harriet. This occurred on March 21, 1932, when John Barneson paid Muriel and Harriet $400.00 each following the receipt by him of "compensation" of $1100.00 from Walsh, O'Connor & Barneson. Muriel's 1932 Federal Income Tax Return reported this $400.00 as Item 3 income—"Interest on Bank Deposits, Notes, Corporation Bonds, etc." The $400.00 is included with three other items of interest in the total of $475.23 shown as Item 3. No amount of income was reported in Muriel's said 1932 return as either Item 1—"Salaries," etc.—or as Item 5—"Income from Partnerships, Syndicates, Pools, etc."

21. By the end of the calendar year 1932 the entire proprietary interest of all partners in Walsh, O'Connor & Barneson, general and limited, was wholly lost as a result of the business reverses suffered by said partnership. In John Barneson's

1932 Federal Income Tax Return, he claimed a loss, as a result of the financial failure of the firm of Walsh, O'Connor & Barneson, of the entire $425,000.00 above mentioned, $150,000.00 of which he had received from Harriet and $150,000.00 of which he had received from Muriel. Said return (which was a joint return of John and Harriet) showed various items of gross income aggregating $199,938.20, but other losses and deductions (additional to the loss of $425,000.00) were claimed on said return in an aggregate amount of $374,669.41. The tax liability shown on said return was zero. Under date of January 25, 1934, the then Internal Revenue Agent in Charge at San Francisco addressed and mailed a letter to John Barneson advising that his office was recommending to the Commissioner of Internal Revenue that John Barneson's income tax return for the year 1932 "be accepted as correct." Nothing in this paragraph is to be construed as an admission by the defendant as to the amount of John Barneson's loss resulting from the failure of Walsh, O'Connor & Barneson.

22. Muriel's 1932 Federal Income Tax Return showed items of gross income aggregating $74,350.52, deductions of $722.55, net income of $73,627.97, and total tax payable (after credit for income tax paid at source) of $11,340.38. Said tax liability of $11,340.38 was fully and duly paid and no portion thereof has ever been refunded, credited or repaid. The only loss claimed on said return was a loss of $2,865.74 sustained on the sale of shares

of stock of Socony-Vacuum Corporation. Muriel never claimed any federal income tax deduction whatever with respect to the aforesaid $150,000.00, transferred to John Barneson in 1928 and 1929 as related above, in any taxable year except the calendar year 1941, the tax liability of which is in controversy in this case; and the Commissioner has never allowed any part of said $150,000.00 as a deduction from Muriel's gross income in any taxable year.

23. The alleged debts of $150,000.00 each from John to Muriel and from John to Harriet were never evidenced by any promissory note; nor were said debts, or either of them, ever acknowledged in writing by John except by John's books of account as related above. No payments of interest or other payments were made by John Barneson to either Harriet or Muriel on the aforesaid alleged loans of $150,000.00 each other than as shown in this Stipulation.

24. In due course following the death of Harriet E. Barneson on April 14, 1936, to wit, July 6, 1937, the executors of her will (The Bank of California National Association, and her sons, Lionel T. and J. Leslie Barneson) filed with the then United States Collector of Internal Revenue for the First District of California, the federal estate tax return (Treasury Form 106) of her estate. Said return reported (Schedule Q) a total gross estate (Item 1) in the amount of $2,759,642.60 and a net estate (Item 9) in the amount of $2,603,660.35. Among the items comprising the gross estate of $2,759,642.60 was an item

of $150,000 (Schedule F, Item 5) representing the balance of $150,000.00 standing to the credit of Harriet E. Barneson on April 14, 1936, in the aforesaid "Harriet E. Barneson Loan a/c" on the books of John Barneson (Exhibit F). The correct net federal estate tax liability of the Estate of Harriet was finally determined by the Tax Court of the United States to be $659,521.30 (after deducting the credit for State estate, inheritance, legacy or succession taxes) and said net estate tax liability was fully paid. Said tax liability reflected the inclusion in Harriet's gross and net estate of the aforesaid item of $150,000.00 at a value equal to its full face value. If Harriet's net estate had been $150,000.00 less in amount than as finally determined, the correct net federal estate tax liability would have been $610,869.02, or $48,652.28 less than the amount which was finally determined and fully paid.

25. The estate of John Barneson, who died February 25, 1941, was probated in the Superior Court of the State of California, in and for the County of San Mateo, case No. 9360 in the files of said court. Lionel T. Barneson was the Executor of John Barneson's will. On June 23, 1941, plaintiff, acting through Lionel T. Barneson, as Guardian of her person and estate, filed in the Superior Court of the County of San Mateo, in case No. 9360, a "Creditor's Claim" for $150,000.00 (a copy of which is attached hereto and marked Exhibit H), covering the same items as are included in the aforesaid "Muriel E. Barneson Loan a/c" (Exhibit A). Said claim was rejected on the

same date by Honorable A. R. Cotton, Judge of said Court, on the ground that it was barred by the statute of limitations. Plaintiff did not bring suit on said claim within three months after June 23, 1941, or at any other time. The final determination of the federal estate tax liability of John Barneson's estate was based upon a determination by the Commissioner of Internal Revenue (hereinafter referred to as the "Commissioner") of a gross estate of $737,434.35 (all of which property was owned by John Barneson at the date of his death) and a net estate (after deducting the specific exemption of $100,000.00) of $569,018.82. The net federal estate tax finally paid on the estate of John Barneson was $113,722.55. In said determination of John Barneson's net estate the Commissioner allowed no deduction whatever for the balance of $150,000.00 shown in the aforesaid "Muriel E. Barneson Loan a/c" (Exhibit A). At all times material hereto John Barneson possessed the requisite financial ability to have paid $150,000.00 to plaintiff on demand. The alleged claim of $150,000.00 of Muriel, an incompetent person, against John was never listed or mentioned in any inventory filed in the court having jurisdiction over the incompetent's guardianship estate.

26. On or before March 15, 1942, plaintiff filed with the then Collector of Internal Revenue for the First District of California, her federal income tax return for the calendar year 1941 on Form 1040 of the Treasury Department Internal Revenue

Service. Said return showed the following items of gross income and deductions therefrom:

	INCOME	
2. Dividends	$102,525.45	
3. Interest on bank deposits, notes, etc.	382.47	
5. Rents and royalties	15,708.47	
7. (b) Net long-term (loss) from sale or exchange of capital assets	(423.15)	
8. Net profit (or loss) from business or profession	490.79	
9. Income from partnerships; fiduciary income, and other income	14,191.23	
10. Total income in items 1 to 9		$132,875.26
	DEDUCTIONS	
12. Interest	220.68	
13. Taxes	12,510.62	
15. Bad debts	150,000.00	
16. Other deductions authorized by law	45.11	
17. Total deductions in items 11 to 16		$162,776.41
18. Net income (item 10 minus item 17)		.00

Item 15—$150,000.00—was the same item or items reflected in the "Creditor's Claim" mentioned in paragraph 25 above. Plaintiff has not claimed and the Commissioner has not allowed any part of said $150,000.00 as a deduction from plaintiff's gross income in any other taxable year. Muriel had a federal income tax liability in every year from 1932 to 1940, both inclusive, and all such liabilities were paid and satisfied in full.

27. Plaintiff's income tax return for the calendar year 1941 was in due course examined by an Examining Officer acting under F. M. Harless, Internal Revenue Agent in Charge at San Francisco, California. Said Examining Officer made a report asserting a deficiency of $70,388.20 in plaintiff's income tax for the calendar year 1941. Plain-

tiff thereafter duly filed a written and verified protest against said asserted deficiency and conference was had between representatives of the plaintiff and a member of the Conference Section of the Office of the Internal Revenue Agent in Charge at San Francisco. Subsequently, the Commissioner, acting by and through the aforesaid F. M. Harless, Internal Revenue Agent in Charge, mailed to the plaintiff notice of his final determination of plaintiff's federal income tax liability for the calendar year 1941, which notice was dated June 25, 1945, and asserted a deficiency of $70,369.97. Said asserted deficiency was based upon six adjustments, which were set forth in the statement attached to the aforesaid final notice of deficiency as follows:

"ADJUSTMENTS TO NET INCOME"

"Net income (loss as disclosed by return)		$(299,901.15)
Unallowable deductions and additional income:		
(a) Bad debt	$150,000.00	
(b) Rents and royalties	4,441.11	
(c) Long-term capital gain	585.43	
(d) Fiduciary income	2,745.17	
(e) Dividends	31.99	157,803.70
Total		$127,902.55
Nontaxable income and additional deductions:		
(f) Guardianship fees		3,000.00
Net income adjusted		$124,902.55"

Plaintiff does not contest the correctness of the Commissioner's adjustments (b), (c), (e) and (f) above but does challenge adjustment (a) in its entirety and adjustment (d) in part. (See paragraph 30 of this Stipulation as to adjustment (d).)

28. On June 28, 1945, plaintiff paid to defendant, as Collector of Internal Revenue for the First District of California, the sum of $70,369.97, as federal income tax asserted by the Commissioner to be owing by plaintiff for the calendar year 1941. At the time said payment was made to the defendant, however, said defendant was given written notice that plaintiff contended that she had no income tax liability whatever for the calendar year 1941; that the amount of said asserted tax, to wit, $70,369.97, and any interest thereon which might subsequently be paid by plaintiff, were paid under protest; and that plaintiff reserved all rights to file a claim for refund for the entire amount paid and in the event said claim was rejected, in whole or part, to bring suit to recover against said defendant or the United States, as the plaintiff might later be advised. Defendant acknowledged receipt of said written protest June 28, 1945. Subsequently, defendant issued a notice and demand on plaintiff for the payment of interest in the amount of $13,-872.52 on the aforesaid asserted tax deficiency of $70.369.97, and, pursuant to said demand, plaintiff paid to the defendant, as interest asserted by defendant to be due from plaintiff, the sum of $13,-872.52 on October 18, 1945.

29. Within the time and in the manner provided by law, plaintiff filed with the defendant on Form 843 of the Treasury Department Internal Revenue Service, a claim for refund of the tax and interest referred to in paragraph 28 above,

which claim was entirely adequate to lay the foundation for this action. The Commissioner failed to render a decision on said claim within six months of the date on which it was filed, or at all. See Complaint, pars. 15 and 16, and Answer, pars. XI and XII.

30. The "net income adjusted" in the amount of $124,902.55 (see paragraph 11, page 12, of the Complaint herein; also paragraph 27 of this Stipulation) upon the basis of which the Commissioner determined the asserted deficiency of $70,369.97, should be reduced by reducing plaintiff's "Fiduciary income" by the amount of $1,504.22 (25% of the amount of $6,016.88 mentioned in paragraph 12 of the complaint).

31. It is agreed that if plaintiff was entitled to the deduction of $150,000.00 which she claimed as Item 15 on her return for the taxable year 1941, as related above, then she is entitled to a judgment that she recover from the defendant the sum of $84,242.49 together with interest, as provided by law, on $70,369.09 of said amount from June 28, 1945, and on $13,872.52 of said amount from October 18, 1945. On the other hand, if plaintiff is not entitled to the aforesaid deduction of $150,000.00, then she is nevertheless entitled to a judgment that she recover from the defendant the sum of $1,242.54, together with interest, as provided by law, on $1,037.92 of said amount from June 28, 1945, and on $204.62 of said amount from October 18, 1945.

32. It is agreed that even although the Exhibits

referred to in this Stipulation are bound separately (for the convenience of the Clerk in filing) they may nevertheless be deemed to be "attached hereto." (Compare e.g., paragraph 6, page 5, line 27 of this Stipulation.)

Dated: September 23, 1948.

BRADY & NOSSAMAN,
By /s/ JOSEPH D. BRADY
and /s/ JAMES L. WOOD,
Attorneys for Plaintiff.
FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.
By /s/ WILLIAM E. LICKING,
Asst. U. S. Attorney.

[Endorsed]: Filed Sept. 24, 1948.

(Here follow Exhibits A, B, B-1, C, D, E, F, G and H, attached to Stipulation of Facts, filed September 24, 1948.)

[Title of District Court and Cause.]

STIPULATION TO CORRECT REPORTER'S TRANSCRIPT

It is hereby stipulated by and between the parties hereto, by their respective counsel, that the Reporter's Transcript of the testimony taken at the trial of the above case heard before Honorable Louis E. Goodman, Judge, on September 28, 1948 be corrected, or treated as corrected, in the following particulars:

Pg.	Line	As Reported	As Corrected
Cover		Lionel Barneson	Lionel T. Barneson
Cover		James E. Smyth	James G. Smyth
1	7	Lionel Barneson	Lionel T. Barneson
1	10	James E. Smyth	James G. Smyth
1	21	James D. Brady	Joseph D. Brady
1	21	Wallace L. Nosseman	James L. Wood
2	7	Barnason	Barneson
2	17	deficit	deficiency
3	20, 21	assumedly that that subsisting debt on January 1, 1941, became	assuming that there was a subsisting debt on January 1, 1941, it became
5	8	txable	taxable
7	12	she	he
8	7	ths	this
9	15	tha	that
10	9	1921	1928-1929
10	11	is that	is it that
11	6	death	debt
12	6	ventures	venturers
12	8	sons	sums
12	9	and the $150,000	and the $125,000
13	12	Harriet	Harold
14	11	$400,000	$425,000
16	8	H. J. Barneson Company	H. J. Barneson & Co.
16	16	H. J. Barneson Company	H. J. Barneson & Co.

Pg.	Line	As Reported	As Corrected
16	19	J. H. Barneson & Company	H. J. Barneson & Co.
16	23	our	out
17	13	ca	can
20	18	1930	1931
21	9	1930	1931
21	20	1941	1931
22	12	1933	1935
22	16	1933	1935
24	24	this owed	this debt owed
37	11	you	he
38	4	incompetent	incompetent's
41	13	brought	brother
41	16	mother's	Muriel's
42	18	Mr. Grady	Mr. Brady
43	19	onme	one
47	24	Mr. Grady	Mr. Brady
48	24	Mr. Grady	Mr. Brady
55	7	Harrie	Harriet
55,	10	Clerk	Collector

Dated October 28, 1948.

BRADY & NOSSAMAN,
By /s/ JOSEPH D. BRADY
and /s/ JAMES L. WOOD,
Attorneys for Plaintiff.

FRANK J. HENNESSY,
U. S. Attorney,
Attorney for Defendant.
By /s/ WILLIAM E. LICKING,
Assistant U. S. Attorney.

[Endorsed]: Filed Oct. 29, 1948.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

The evidence satisfies me that the deduction claimed by the plaintiff in her 1941 income tax return as a worthless debt is proper. It was in fact a "debt which became worthless within the taxable year." (1941). § 23(k)(l) Int. Rev. Code.

Accordingly judgment may be entered for plaintiff as prayed upon findings to be presented in accordance with the Rules.

Dated: February 7, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Feb. 8, 1949.

[Title of District Court and Cause.]

ORDER OF COURT

Upon the application of C. Elmer Collett, Assistant United States Attorney for the Northern District of California, and good cause appearing therefor,

It Is Hereby Ordered that the defendant above named may have to and including March 1, 1949 within which to lodge counter Findings of Fact and Conclusions of Law, or proposed amendments

to plaintiff's Finding of Fact and Conclusions of Law heretofore lodged in the above action.

Dated: February 18, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Feb. 18, 1949.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action regularly came on for trial, without a jury, on September 28, 1948, before the Honorable Louis E. Goodman, Judge presiding, the plaintiff in said action appearing by her counsel, Brady & Nossaman, of Los Angeles, by Joseph D. Brady, Esq. and James L. Wood, Esq., and the defendant in said action appearing by his counsel, Frank J. Hennessy, Esq., United States Attorney, and William E. Licking, Esq., Assistant United States Attorney. Having considered the pleadings, admissions, oral testimony, stipulated facts, and arguments of counsel, the Court makes and publishes the following:

Findings of Fact

The Court finds that:

Upon the trial the parties through their respective counsel duly made and filed their written stipu-

lation of facts. As and for its findings of fact the Court adopts said stipulation, including the exhibits attached thereto, and, based upon said stipulation as supplemented by certain admissions and oral testimony, finds the essential facts to be as follows:

I.

That at all material times plaintiff, Muriel E. Barneson, and Lionel T. Barneson were, and still are brother and sister, citizens of the United States, domiciled in the State of California.

II.

That the plaintiff, Muriel E. Barneson, on March 3, 1931, became a mentally incompetent person and has at all times since been incapable of caring for her property or understanding the nature or effect of her acts. (Tr. 19, 20, 21). Between March, 1931, and April, 1936, Muriel's affairs were handled for her by her mother under a power of attorney (Tr. 21). Plaintiff was adjudged to be an incompetent person by the Superior Court of Ventura County, State of California, on April 3, 1936. Lionel T. Barneson has at all times since April 3, 1936, been the duly appointed, qualified and acting guardian of her person and estate.

III.

Defendant is, and at all times since May 14, 1945, has been, the duly appointed and acting Collector of Internal Revenue for the First District of California.

IV.

That on May 8, 1928, Muriel Barneson advanced the sum of $105,000.00 to her father, John Barneson, by her check numbered 444 (Ex. D. Stip.). John Barneson entered this advance upon his books (Ex. B of Stip.) by crediting Muriel Barneson for a loan of $105,000.00. On the same day he debited the same account with an entry "Transfer to Loan A/C J.2368a $100,000.00." That last credit entry to said account (Ex. B & B-1 of Stip.) was made in 1941 (Tr. 59). The last debit entry to said account was made in 1941. In another account kept by John Barneson (Ex. A of Stip.) upon identical sheets (Form B-9117) and entitled in said book "Muriel E. Barneson, Loan A/C a credit entry dated May 8, 1928. J 2368 A $100,000.00" appears. On May 14, 1929 Muriel Barneson advanced the sum of $50,000.00 to John Barneson by her check numbered 378 (Ex. E Stip.). No entry was made in the Muriel E. Barneson account for said check, but a credit entry was made in the Muriel E. Barneson loan account for the amount of said check on May 15, 1929.

V.

The plaintiff duly filed her federal income tax return for the calendar and taxable year 1941; in that return she claimed a bad debt deduction in the amount of $150,000.00 representing the aforesaid advancements to John Barneson, her father. Subsequently, said return was examined by the Inter-

nal Revenue Agent in Charge at San Francisco who disallowed the claimed bad debt deduction of $150,-000.00, made certain other adjustments and eventually asserted on behalf of the Commissioner of Internal Revenue a deficiency in income tax for the taxable year 1941 of $70,369.97. Plaintiff did not claim, and the Commissioner has not allowed any part of said $150,000.00 as a deduction from plaintiff's gross income for any taxable year.

VI.

On June 28, 1945, the plaintiff paid to the defendant, as Collector of Internal Revenue, the sum of $70,369.97, the amount asserted as a deficiency in income tax for the taxable year 1941, and on October 18, 1945, plaintiff paid defendant the further sum of $13,872.52 as interest on said asserted deficiency. Of said deficiency, $1,037.92, and interest in the amount of $204.62, arose from adjustments to gross income other than the disallowance of said bad debt deduction, and it has been stipulated that plaintiff is entitled to recover these later sums with interest as provided by law regardless of the decision as to the bad debt issue.

VII.

Plaintiff filed an appropriate and timely claim for refund of the deficiency in tax and interest above mentioned and the Commissioner of Internal Revenue failed to render a decision thereon within six months after the date of filing or at all.

VIII.

No part of the deficiency in income tax or interest paid by the plaintiff for the taxable year 1941 has been refunded, credited or repaid.

Conclusions of Law

As Conclusions of Law from the foregoing Findings of Fact, the Court concludes that:

I.

The Court has jurisdiction of the parties and the subject matter of this action.

II.

Plaintiff commenced this action within the time and in the manner provided by law.

III.

On January 1, 1941, John Barneson was indebted to the plaintiff, Muriel E. Barneson, in the amount of $150,000.00 because of cash advances made to him by said Muriel E. Barneson on the 8th day of May, 1928, in the sum of $105,000.00, and on the 14th day of May, 1929, in the sum of $50,000.00 upon a mutual and open account (Ex. B, B-1 Stip.), no part of which has ever been repaid.

IV.

Said indebtedness of $150,000.00 was not worthless or outlawed on February 25, 1941, the date of John Barneson's death, or at any time prior thereto, nor was it barred or outlawed by the applicable

California statutes of limitation on June 23, 1941, for the reason that said debt was upon an open, mutual and current book account between Muriel Barneson and John Barneson, her father (Ex. B, B-1, Stip.), and the last entries in said account had been made in the year 1941 but Muriel Barneson became an insane and incompetent person on March 3, 1931, and has been such at all times since.

V.

Said debt became worthless within the taxable year 1941 by reason of the failure, neglect and refusal of Lionel Barneson as guardian of Muriel E. Barneson, an incompetent person, to file suit against himself as executor of John Barneson's Will within three months after rejection of Muriel Barneson's claim for said debt on June 23, 1941, by A. R. Cotton, Judge of the Superior Court of the State of California in and for the County of San Mateo, case No. 9360 as required by Section 714 of the Probate Code of the State of California. Said claim was at the time of its presentation and also at the time of its rejection on June 23, 1941, good, valid, existing and not an outlawed or barred claim against the estate of said John Barneson upon a mutual, open and current book account between said Muriel Barneson and John Barneson, deceased, and the operation of the statute of limitations against the collection of said account had been and was suspended at all times after March 3, 1931, because of the insanity of Muriel Barneson which

commenced at said time and has continued at all times since (see Secs. 352, 357, 337, .2 (3) California Code of Civil Procedure). Had Lionel Barneson brought suit upon the rejected claim for said indebtedness of $150,000.00, he was entitled to recover a judgment against the estate of John Barneson, deceased for that amount, and the estate was possessed of assets sufficient to pay said judgment.

VI.

Plaintiff was not entitled by the provisions of Section 23(k)(l) of the Internal Revenue Code as amended to deduct from her gross income for the taxable year 1941 the amount of $150,000.00 as a bad debt.

VII.

Plaintiff is not entitled to recover from the defendant the sum of $84,242.49 with interest as provided by law on $70,369.97 of said amount from June 28, 1945, and on $13,872.52 of said amount from October 18, 1945.

VIII.

That there was probable cause for the actions of the defendant or other officials of the Treasury Department as found by the Court, and the judgment to be entered herein upon becoming final shall be provided for and paid out of the proper appropriation from the Treasury of the United States.

Dated this .... day of March, 1949.

.....

Judge of the District Court.

Approved as to form as provided by Rule 5(d) of this Court.

FRANK J. HENNESSY,
U. S. Attorney.

Lodged March 1, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff respectfully presents the following objections to Defendant's Proposed Amended Findings of Fact and Conclusions of Law:

Preliminary Statement

Pursuant to "Order for Judgment" for plaintiff, filed February 8, 1949, plaintiff, on February 14, 1949, lodged Findings of Fact and Conclusions of Law as well as a form of Judgment, all approved as to form by counsel for defendant.

On March 1, 1949, defendant lodged "Defendant's Proposed Amended Findings of Fact and Conclusions of Law." They are utterly inconsistent with the "Order for Judgment". For many reasons hereinafter set forth, it is submitted that they should be rejected and that the Court should make findings and conclusions substantially as lodged by plaintiff.

Basis of Defendant's Proposed Findings and Conclusions

The basis for the extraordinary findings and conclusions proposed by defendant is explained in a letter dated March 1, 1949, from counsel for defendant to Judge Goodman, copy of which counsel for plaintiff received March 3, 1949.

Completely reversing the position taken by the defendant at the trial and in its brief, namely, that the $150,000 debt was barred not later than 1933, defendant now contends that the debt was not barred at the time the probate court rejected it on June 23, 1941. From this premise, defendant now asserts (letter March 1, 1949, p. 2) that "it is believed a collectible judgment could have been recovered" had plaintiff's guardian sued the estate of John Barneson within the three months' period prescribed by Section 714 of the Probate Code. "The point is," says defendant, "that while the debt became worthless in 1941, that worthlessness was the result of the voluntary act of the guardian-plaintiff * * *." (Underscoring supplied.)

Plaintiff's Reply to New Position of Defendant.

1. Defendant should not now be heard to argue that the California statute of limitations had not run prior to the taxable year 1941 for the following reasons:

(a) At the trial defendant (as well as plaintiff) took the position that the statute of limitations ran many years prior to 1941, namely, 1933. (See Tr. p. 10, lines 1-10; Tr. p. 15, lines 11-17; references

herein to the Transcript refer to it as corrected by Stipulation filed October 29, 1948.) This admission of defendant obviated the necessity, which might otherwise have existed, of the plaintiff's satisfying this Court by some other proof that the Probate Court's rejection of Plaintiff's creditor's claim was correct.

(b) In defendant's brief (p. 21, lines 30-32) the flat admission is made that the $150,000 debt became barred "some time in 1933". Even assuming—despite the contrary position taken at the trial—that defendant could still have raised the point on brief which he now seeks to advance for the first time, the position taken in his brief constituted an election to stand on the position taken at the trial and, consequently, an abandonment or waiver of any attempt to claim that the California statute had not run even as late as February 25, 1941, the date of John Barneson's death.

(c) In the "Statement of Facts" in defendant's brief, speaking with reference to the stipulated fact that plaintiff's creditor's claim for $150,000 was rejected by the Probate Court "on the ground that it was barred by the statute of limitations," the defendant stated that such rejection was "Pursuant to law." (Def.'s br., p. 4, line 31.) This was a flat admission by defendant that the pertinent facts were such that the rejection by the Probate Court was correct. This admission is as binding on this defendant as it would be on any litigant. Courts sit to decide issues as they are presented by

the litigants. This Court has already decided such issues in favor of plaintiff.

2. Defendant's New Position is Without Merit in any Event and His Proposed Findings and Conclusions are Otherwise Objectionable.

Defendant asks the Court to make a finding of fact that the plaintiff "became a mentally incompetent person on March 3, 1931," etc. (Defendant's Proposed Finding II, p. 2, lines 10-11.) The only testimony bearing on this subject was to the effect that plaintiff has never been able to carry on her own personal business affairs since March, 1931. (Tr. p. 20, lines 18-21, as corrected.) Putting aside the question whether such testimony would justify the finding which defendant requests, and putting aside also the question whether such a finding would be equivalent to a finding that plaintiff was "insane" since March, 1931, within Section 352(2), C.C.P., now mentioned for the first time (cf. Wade v. Busby, 66 C.A. (2d) 700), it is clear that it would not aid the defendant in any case. Section 352 states that it applies only if the disability exists "at the time the cause of action accrued." See, also, Section 357, C.C.P.

Plaintiff's cause of action accrued as to the $150,000 and the statute of limitations started to run not later than May 15, 1929, the later of the two dates which appear in the "Muriel E. Barneson Loan a/c" (Stip. Ex. A). See Bailey v. Hoffman, 99 C.A. 347. Plaintiff was not insane or incompetent at that time. Once the statute has started to run, disability, including insanity, does not sus-

pend the time for bringing suit. Calif. Sav. etc., Soc. v. Culver, 127 Cal. 107 at 111. It is clear, we submit, that defendant is in error in thinking that Section 352 has any application here.

Defendant's Proposed Finding IV (pp. 2-3) violates the settled rule stated in Brown Paper Mill Co. v. Irvin, 134 F. (2d) 337, 338 (C.C.A.-8, 1943) as follows:

"Findings of fact should be 'a clear and concise statement of the ultimate facts, and not a statement, report, or recapitulation of evidence from which such facts may be found or inferred.'" (Citing cases; underscoring supplied.)

In any event, if some of the evidence is to be recapitulated in the findings, contrary to correct practice, all of the evidence set forth in the Stipulation of Facts should be set out in full in the findings.

Defendant's Proposed Finding IV is otherwise improper. It uses the term "advance", which is meaningless in this setting and which will not be found anywhere in the Stipulation of Facts or elsewhere in the record. The Court's "Order for Judgment" necessarily implies that the Court agreed with plaintiff that the items of $100,000 and $50,000 were loans. Plaintiff's Proposed Finding IV (p. 2, line 24) properly describes these two items as "loans".

Defendant's Proposed Finding IV is likewise improper and misleading because it ignores the stipulated fact that the account entitled simply

"Muriel E. Barneson" (Exs. B and B-1) is "another and different account" from that which contained the $150,000 debt and which was known as the "Muriel E. Barneson Loan a/c" (Ex. A). (Stip., par. 6, p. 5, lines 24-26; p. 6, lines 1-8.)

In addition to being directly opposed to the Court's "Order for Judgment", defendant's Conclusions of Law are otherwise improper and unsound in other respects.

There was an issue of fact in this case as to whether the cash transfers of $100,000 and $50,000 were loans or something else. The finding of the Court on this issue is reflected in Plaintiff's Proposed Finding IV (p. 2). Defendant proposes no finding of ultimate fact in this regard; and defendant's Proposed Finding IV (pp. 2-3) is not adequate. In his proposed Conclusion of Law III (p. 4), defendant does recite that John Barneson was indebted to the plaintiff in the amount of $150,000 on January 1, 1941, but he goes on and recites evidentiary matter, in a manner which is both erroneous and highly misleading. Defendant refers (p. 4, line 21) to Exhibits B and B-1. These are merely two different pages of the same account. They are both part of the "Muriel E. Barneson" account. Exhibit A, however, is a photostat of an entirely different and separate account—the "Muriel E. Barneson Loan a/c". (Stip., par. 6, p. 5, lines 24-30; p. 6, lines 1-8.) One can only read defendant's Conclusion III, especially line 21, page 4, as saying that the $50,000 item is a part of the ac-

count evidenced by Exhibits B and B-1. This is contrary to the stipulated facts; the loan of $50,000 was never a part of the "mutual and open account". The balance of the debt of $150,000, to-wit, $100,000, was transferred from the "mutual and open account" to the different "Muriel E. Barneson Loan a/c" on May 8, 1928—the very same date that the item of $105,000 went into the "Muriel E. Barneson" account (Ex. B, credit)—and never thereafter was a part of the "mutual and open account."

Conclusion of Law V, proposed by defendant (p. 5), is unsound and otherwise objectionable for a number of reasons. It is predicated on the factual assumption that Muriel was "insane" at all times after March 3, 1931, within the meaning of Section 352 C.C.P. (p. 5, lines 15-17), and no finding that she was "insane" has been proposed or could properly be made on the evidence; the evidence goes no further than to show that Muriel has not "been able to carry on her own personal business affairs since" March of 1931. (Tr. p. 20, as corrected.) But even if Muriel had been "insane" since March, 1931, that would be irrelevant; supra, page 4.

While conceding that the debt "became worthless within the taxable year 1941" (p. 5, line 1), defendant now asks this Court to conclude, as a matter of law (Conclusion V), that the "reason" it became worthless was because of the alleged "failure, neglect and refusal" of plaintiff's guar-

dian to bring suit on the debt within three months after rejection of the claim by Judge Cotton on June 23, 1941.

Where is there any evidence in this record to support either a finding of fact or a conclusion of law of "failure, neglect, or refusal" on the part of plaintiff's guardian in connection with his admitted omission to bring suit following Judge Cotton's rejection? Defendant points to none and there is none.

If under the law as applied to the facts, the statute of limitations ran in May, 1933 (three years, incidentally, before the guardian's appointment), then to have brought an action within three months after June 23, 1941, would obviously have been a futile gesture, particularly when such action would have been brought in the same court. The guardian was in the court house in Redwood City when the attorney presented the claim to Judge Cotton in chambers. (Tr. 37) The claim (Stip., Ex. H) shows on its face that the statute ran in 1933, and on its back it shows the rejection by Judge Cotton.

If the guardian's refraining from bringing what any reasonable man, cognizant of Judge Cotton's action and the basis thereof, would have regarded as a futile suit, involved what defendant now characterizes by the terms "failure, neglect and refusal," why did not counsel for defendant interrogate the guardian in this respect when he was on the witness stand?

The answer is obvious: after careful study of the whole case incident to the careful preparation of the 22-page stipulation of facts, counsel for defendant was of the opinion during the trial that the statute of limitations ran in 1933. (Tr. 10; 15.) And, after careful study of the entire record, including the oral testimony, counsel for defendant were of the same opinion when defendant's brief was filed—see particularly page 21, lines 28-32, and page 22, lines 1-7. If at the latter stage of this litigation, if not by the time of the trial, counsel for defendant had not perceived the subtle point, predicated on Section 352 C.C.P., which he now advances for the first time, how can it in fairness be said that the guardian should have perceived it during the three months following June 23, 1941?

In the letter of March 1, 1949, from defendant's counsel to Judge Goodman, the inconsistency between defendant's brief and the position now taken is recognized. The statement is made (top of page 2) that it was "taken for granted" that the four-year statute expired in 1933. We are utterly unable to understand how counsel for defendant (or anyone) can properly accuse plaintiff's guardian with "neglect" for not taking an action in 1941 that such counsel, as late as January 14, 1949, would have necessarily regarded as a futile gesture.

Apart from the foregoing, the defendant's unfounded assertion of "failure, neglect and refusal" necessarily imputes bad faith on the part of the

guardian. This is not only unjustified and unjustifiable; indeed the law is settled to the contrary. "Good faith is always presumed until the contrary is shown by proof." (Flynn & Emrich Co. v. Federal Trade Commission, 52 F. (2d) 836, 838 C.C.A.-4, 1931); (underscoring supplied.) See, also, the strong statement in Equitable Trust Co. v. Washington-Idaho Water, Light & Power Co., 300 Fed. 601 at 617 (Dist. Ct. E. D. Wash., S. D., 1924). And the Tax Court on occasion has seen fit strongly to admonish counsel for the Commissioner of Internal Revenue not to throw doubt on the bona fides of actions of taxpayers unless he has evidence to support it. See Millard D. Olds, 15 B.T.A. 560 at 565. Compare, also, C.C.P. Sec. 1963, subdivisions 1, 4, 19, 20 and 33.

But let us assume, for the sake of the argument, that if the guardian had brought suit in 1941, he would have recovered a judgment for $150,000. Even so, in the absence of bad faith in omitting to take such action, the deduction would nevertheless be allowable because the income tax law does not insist on infallibility of honest judgment. The very existence, in the Internal Revenue Code, of the bad debt deduction provision itself shows that. Examples are to be found in the following cases under the bad debt section: Kate I. Nixon, 2 B.T.A. 524; Cruger Co., 11 B.T.A. 306 at 308; Robert S. Dennison, 4 T.C. 806.

See, also, Section 23 (e), allowing deductions for losses. Under this provision, Treasury Regulations

111, Sec. 29.23(e)-1, provides that "A loss occasioned by damage to an automobile maintained for pleasure, where such damage results from the faulty driving of the taxpayer or other person operating the automobile, but is not due to the willful act of negligence of the taxpayer, is a deductible loss in the computation of net income." And see last paragraph of opinion of the Second Circuit in Shearer v. Anderson, 16 F. (2d) 995 at 997, 6 A.F.T.R. at 6485.

The omission of plaintiff's guardian to bring suit after June 23, 1941, was not "voluntary"—a word which appears near the end of the defendant's letter of March 1—in any sense which would militate against deductibility here. It may be admitted that if an action to recover would have been successful and that the guardian, knowing this, deliberately refrained from suing, the deduction would not be allowable. But there is no evidence here that brings this case within that principle; quite the contrary.

And the defendant now concedes that "the debt became worthless within the taxable year 1941." (Defendant's Conclusion of Law V, p. 5, line 1.)

Conclusion

It is respectfully submitted that the Findings of Fact and Conclusions of Law lodged by plaintiff on February 14, 1949, are adequate and should be adopted, and those lodged by defendant on March 1 should be rejected in their entirety.

It is possible, however, that in view of the present

challenge of defendant, the court may wish to adopt additional findings. For this reason possible substitutes for findings IV and X will be found in the Appendix hereto.

Dated: March 5, 1949.

Respectfully submitted,
BRADY & NOSSAMAN,
By /s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAMAN,
/s/ JAMES L. WOOD,
Attorneys for Plaintiff.

Appendix

Suggested substitutes for Findings of Fact IV and X:

IV.

On January 1, 1941 one John Barneson was indebted in the amount of $150,000 to plaintiff Muriel E. Barneson for cash loans in the aggregate sum of $150,000 made by plaintiff to said John Barneson in 1928 and 1929, no part of which has ever been repaid. In his brief filed in this court on January 12, 1949, the defendant claimed that "the four-year statute of limitations for bringing suits upon an open account expired some time in 1933 as to the moneys advanced by her [plaintiff] to her father [John Barneson] in 1928, 1929." Plaintiff took the same position as defendant as to the time when the California statute of limitations had run. In his aforesaid brief the defendant, in his "Statement of Facts", also conceded and contended that Judge

Cotton's rejection of plaintiff's aforesaid creditor's claim was "Pursuant to law." The Court finds that the California statute of limitations applicable to said debt of $150,000 ran in the year 1933.

X.

Said debt of $150,000 did not become worthless at any time prior to February 25, 1941, the date of John Barneson's death. The estate of John Barneson was probated in the Superior Court of the State of California in and for the County of San Mateo. On June 23, 1941, plaintiff, acting through the guardian of her person and estate, filed in said probate proceeding a "Creditor's Claim" for $150,000 covering the same two items ($100,000 loaned in 1928 and $50,000 loaned in 1929) as are mentioned in Finding IV above. Said claim was rejected on the same date by Honorable A. R. Cotton, Judge of said Court, on the ground that it was barred by the statute of limitations. Plaintiff did not bring suit on said claim within three months after June 23, 1941, or at all. [Stip., par. 25, p. 17].

[Endorsed]: Filed Mar. 7, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action regularly came on for trial, without a jury, on September 28, 1948, before the Honorable Louis E. Goodman, Judge presiding,

the plaintiff in said action appearing by her counsel, Brady & Nossaman, of Los Angeles, by Joseph D. Brady, Esq. and James L. Wood, Esq., and the defendant in said action appearing by his counsel, Frank J. Hennessy, Esq., United States Attorney, and William E. Licking, Esq., Assistant United States Attorney. Having considered the pleadings, admissions, oral testimony, stipulated facts, and arguments of counsel, the Court makes and publishes the following:

Findings of Fact

The Court finds that:

Upon the trial the parties through their respective counsel duly made and filed their written stipulation of facts. As and for its findings of fact the Court adopts said stipulation, including the exhibits attached thereto, and, based upon said stipulation as supplemented by certain admissions and oral testimony, finds the essential facts to be as follows:

I.

Plaintiff, Muriel E. Barneson, was duly adjudged to be incompetent on April 3, 1936. Lionel T. Barneson has at all times since April 3, 1936 been the duly appointed, qualified and acting guardian of her person and estate.

II.

At all material times plaintiff Muriel E. Barneson and said Lionel T. Barneson were, and still are, citizens of the United States, domiciled in the State of California.

III.

Defendant is, and at all times since May 14, 1945, has been, the duly appointed and acting Collector of Internal Revenue for the First District of California.

IV.

On January 1, 1941 one John Barneson was indebted in the amount of $150,000 to plaintiff Muriel E. Barneson for cash loans in the aggregate sum of $150,000 made by plaintiff to said John Barneson in 1928 and 1929, no part of which has ever been repaid.

V.

Plaintiff duly filed her federal income tax return for the calendar and taxable year 1941. In that return she claimed a bad debt deduction in the amount of $150,000 representing the aforesaid debt. Subsequently, said return was examined by the Internal Revenue Agent in Charge at San Francisco. Said official disallowed the $150,000 bad debt deduction, made certain other adjustments, and eventually asserted, on behalf of the Commissioner of Internal Revenue, a deficiency for the taxable year 1941 of $70,369.97. Plaintiff has not claimed and the Commissioner has not allowed any part of said $150,000 as a deduction from plaintiff's gross income in any other taxable year.

VI.

On June 28, 1945, plaintiff paid to the defendant, as Collector of Internal Revenue, the sum of $70,369.97, the amount of the asserted deficiency. Said

payment was made under simultaneous written protest that no deficiency was owing. Subsequently, on notice and demand from the defendant, plaintiff paid defendant, on October 18, 1945, the sum of $13,872.52 as interest on said asserted deficiency. The amount of $1,037.92 of the asserted deficiency of $70,369.97, and the amount of $204.62 of the interest of $13,872.52 arose from adjustments other than disallowance of said bad debt deduction, and it has been stipulated by the parties in this case that plaintiff is entitled to recover such sums, with interest as provided by law, regardless of the decision as to the bad debt issue. The balance of the deficiency paid, to wit, $69,332.05, and the balance of the interest paid, to wit, $13,667.90, arise from the bad debt deduction disallowance.

VII.

Plaintiff duly filed an appropriate and timely claim for refund of the tax and interest above mentioned. The Commissioner failed to render a decision thereon within six months after filing or at all.

VIII.

No part of the tax or interest paid by the plaintiff, as aforesaid, has been refunded or credited or repaid.

IX.

Plaintiff commenced this action within the time and in the manner provided by law.

X.

Said debt of $150,000 did not become worthless

at any time prior to February 25, 1941, the date of John Barneson's death.

XI.

Said debt became worthless within the taxable year 1941.

XII.

There was probable cause for the acts done by defendant James G. Smyth, Collector of Internal Revenue, acting pursuant to the orders and directions of the Commissioner of Internal Revenue.

Conclusions of Law

As Conclusions of Law from the foregoing Findings of Fact, the Court concludes that:

I.

The Court has jurisdiction of the parties and the subject matter of this action.

II.

The debt in the amount of $150,000 heretofore referred to became worthless within the taxable year 1941 within the meaning of Section 23 (k) (1) of the Internal Revenue Code as amended.

III.

Plaintiff was legally entitled to deduct from her gross income for the taxable year 1941 the amount of $150,000 as a bad debt.

IV.

Plaintiff is entitled to recover from the defendant the sum of $84,242.49 together with interest as provided by law on $70,369.97 of said amount

from June 28, 1945, and on $13,872.52 of said amount from October 18, 1945.

V.

By reason of the probable cause for the acts of the defendant or other officials of the Treasury Department, as found by the Court, the judgment to be entered herein, upon becoming final, shall be provided for and paid out of the proper appropriation from the Treasury of the United States.

Dated: San Francisco, California, March 25th, 1949.

/s/ LOUIS E. GOODMAN,
Judge of the District Court.

Approved as to form as provided by Rule 5 (d) of this Court.

/s/ FRANK J. HENNESSY,
U. S. Atty.

/s/ C. ELMER COLLETT,
Asst. U. S. Atty.

I have rejected defendant's proposed amendments to the Findings because they raise questions properly presentable on Motion for New Trial.

March 25, 1949.

/s/ LOUIS E. GOODMAN,
District Judge.

[Endorsed]: Filed Mar. 25, 1949.

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 27929-G

MURIEL E. BARNESON, an Incompetent Person, by Lionel T. Barneson, Guardian,
Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,
Defendant.

JUDGMENT

The above-entitled action, having regularly come on for trial, without a jury, on September 28, 1948, before the Honorable Louis E. Goodman, Judge presiding, the plaintiff in said action appearing by her counsel, Brady & Nossaman, by Joseph D. Brady, Esq., and James L. Wood, Esq., and the defendant in said action appearing by his counsel, Frank J. Hennessy, Esq., United States Attorney, and William E. Licking, Esq., Assistant United States Attorney, and the Court having considered the stipulated facts, admissions, oral evidence and arguments of counsel, and having made and filed its Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed:

(1) That plaintiff, Muriel E. Barneson, an incompetent person (Lionel T. Barneson, guardian), recover from defendant, James G. Smyth, Collector of Internal Revenue, the sum of $84,242.49,

overpayment of federal income tax for the calendar year 1941, together with interest as provided by law on $70,369.97 of said amount from June 28, 1945, and on $13,872.52 of said amount from October 18, 1945.

(2) That the Court having heretofore certified, pursuant to Section 2006, Title 28, of the United States Code, that there was probable cause for the acts done by defendant, James G. Smyth, Collector of Internal Revenue, as set forth in said Findings of Fact, the amount for which judgment is herein given against said defendant shall, upon the judgment becoming final, be provided for and paid out of a proper appropriation from the Treasury of the United States.

Dated this 25th day of March, 1949.

/s/ LOUIS E. GOODMAN,
Judge of the District Court.

Entered in Civil Docket March 28, 1949.

The foregoing judgment is hereby approved as to form as provided by Rule 5 (d) of this Court.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ C. ELMER COLLETT,
Asst. U. S. Attorney.

[Endorsed]: March 25, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

It appearing to the satisfaction of the Court that the subject matter of the judgment rendered in favor of the plaintiff and against the defendant in the above-entitled action is money exacted by or paid to the defendant, and by him paid into the Treasury of the United States, the Court hereby certifies that there was probable cause for the acts of the defendant in collecting said money and paying the same into the Treasury, and that said defendant acted under the directions of the Secretary of the Treasury or other proper officer of the Government in so doing.

Dated this 25th day of March, 1949.

/s/ LOUIS E. GOODMAN,
Judge.

Approved as to form this 14th day of February, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ C. ELMER COLLETT,
Asst. U. S. Attorney.

[Endorsed]: Filed March 25, 1949.

[Title of District Court and Cause.]

NOTICE

You Are Hereby Notified that on March 28, 1949, a Decree Judgment was entered of record in this office in the above-entitled case.

San Francisco, California, Mar. 29, 1949.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Honorable the above-entitled Court, and to Muriel E. Barneson, an Incompetent Person, by Lionel T. Barneson, Guardian, Plaintiff, and to Brady and Nossaman, attorneys for Plaintiff:

You are hereby notified that on April 18, 1949, at the hour of 10:00 o'clock a.m. on said day, or as soon thereafter as counsel can be heard, at the Court Room of the above-entitled Court, in the Post Office Building in the City and County of San Francisco, State and Northern District of California, defendant will and hereby does move the above-entitled court for its order granting new trial in the above-entitled action.

Said motion will be made on the ground that said Findings of Fact and Conclusions of Law and Judgment made herein are:

1. The decision is contrary to the law in the case.

2. The decision is contrary to the evidence in the case.

3. The decision and judgment are contrary to the law and evidence in the case.

4. The evidence is insufficient to support the decision.

5. The evidence is insufficient to support the decision, and judgment.

6. The decision is against the weight of and contrary to the evidence, and that the evidence herein compels contrary Findings, Conclusions and Judgment.

7. The decision and judgment are contrary to and against law.

8. The evidence shows that a decision and judgment should have been rendered in favor of defendant, and that the decision and judgment, as rendered, are contrary to law, and will be based on this notice, the minutes of the court, the record of the evidence herein, on the said Findings, Conclusions and Judgment made herein, and on all the

records, papers, pleadings and files in the above-entitled action.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ C. ELMER COLLETT,
Asst. U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed April 7, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

Beatrice H. Schryver, being duly sworn, deposes and says:

That her business address is 422 United States Courthouse and Post Office Building, Seventh and Mission Streets, San Francisco, California; that she is a citizen of the United States and a resident of the City and County of San Francisco; that she is over the age of eighteen years, and not a party to the above-entitled cause; that on the 7th day of April, 1949, she placed one copy of Notice of Motion for New Trial, in the above-entitled action, in an envelope addressed to Messrs. Brady & Nossaman, Attorneys at Law, 433 South Spring Street, Los Angeles 13, California, which is the office ad-

dress of the attorneys for the above-named Plaintiff, sealed said envelope, and deposited it in the United States Mail at San Francisco, California, with postage thereon fully prepaid; that there is delivery service by United States mail at the place so addressed, and regular communication by United States mail between the place of mailing and the place so addressed.

/s/ BEATRICE H. SCHRYVER.

Subscribed and sworn to before me this 8th day of April, 1949.

[Seal] /s/ E. C. EVENSEN,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed April 8, 1949.

[Title of District Court and Cause.]

STATEMENT OF PLAINTIFF'S REASONS IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL AND LIST OF AUTHORITIES ON WHICH PLAINTIFF RELIES

1. A trial court is loath to grant a new trial.
   3 Moore's Federal Practice,
   Sec. 59.01, page 3242.

2. The court will not listen again to the arguments made prior to judgment.

Hostetter Co. v. Comerford,
99 Fed. 834, 835 (Cir. Ct., N. Y., 1900);
Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co., 64 Fed. 125, 132 (Cir. Ct., Ohio, 1894);
Giant Powder Co. v. California Vigorit Powder Co., 5 Fed. 197, 201 (Cir. Ct., Calif., 1880).

3. As to points of law argued prior to judgment, the losing party's remedy in case of error is by appeal.

Jenkins v. Eldridge, Fed. Cas. No. 7267, p. 506 (Cir. Ct., Mass., 1845);
Giant Powder Co. v. California Vigorit Powder Co., supra;
Champion Spark Plug Co. v. Sanders, 63 F. Supp. 345, 346 (D.C., N.Y., 1945).

4. In submitting the case at bar for decision, defendant not only admitted but contended that the statute of limitations ran in 1933. Defendant will not now be permitted to repudiate that admission or to escape its binding effect.

King v. Edward Hines Lumber Co., 68 F. Supp. 1019 (D.C., Oregon, 1946).

5. The defendant having tried this lawsuit on one theory, cannot obtain a new trial in an effort to retry it on a different theory, much less a wholly inconsistent one.

Colonial Book Co. v. Amsco School Publications, 159 Dept. Justice Bulletin, 6 Fed. Rules Serv. 59 b. 1, Case No. 1 (D. C., N.

Y., 1942). (Case originally defended on theory of no infringement of plaintiff's patent; defendant unsuccessfully sought new trial on theory plaintiff had no valid patent);

Lockwood v. Cleveland, 20 Fed. 164 (Cir. Ct., N. J., 1884). (Situation parallel to Colonial Book Co. case, supra);

Teller v. Athens Stone Works, 9 Fed. Rules Serv. 51.33, Case No. 2 (D. C., Tenn., 1946).

6. In any event a new trial should not be granted where, as here, the judgment would be for the plaintiff even if a new theory were considered. See Plaintiff's Objections to Defendant's Proposed Amended Findings of Fact and Conclusions of Law, filed March 7, 1949, p. 8, line 22, to p. 10, line 3.

Dated: April 15, 1949.

/s/ BRADY & NOSSAMAN,
By /s/ J. D. B.,
Attorneys for Plaintiff.

[Endorsed]: Filed April 19, 1949.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Defendant's Motion for New Trial having regularly come on for hearing at 10:00 o'clock a.m. on the 18th day of April, 1949, Honorable Judge Louis E. Goodman presiding; and the Court hav-

ing heard and considered Defendant's Motion for New Trial, the minutes of the Court, the record of the evidence, Findings of Fact and Conclusions of Law, the Judgment, and all other records, papers, pleadings and files in the above-entitled action; it is hereby

Ordered, Adjudged and Decreed that defendant's Motion for New Trial be denied.

Dated: April 19th, 1949.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed April 19, 1949.

[Title of District Court and Cause.]

NOTICE

To: Messrs. Brady & Nossaman, 433 South Spring St., Los Angeles 13, Calif. Frank J. Hennessy, Esq., P. O. Bldg., San Francisco, Calif.

You Are Hereby Notified that on April 19, 1949, Judge Louis E. Goodman, Judge, Ordered defendant's motion for a new trial Denied.

San Francisco, California, April 20, 1949.

C. W. CALBREATH, ECE
Clerk, U. S. District Court.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendant James G. Smyth hereby appeals to the United States

Court of Appeals for the Ninth Circuit from the final judgment entered by the United States District Court for the Northern District of California, in favor of Plaintiff and against said defendant on March 28, 1949, and from the Order Denying defendant's Motion for New Trial by said Court on April 19, 1949.

Dated: May 19, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed May 27, 1949.

[Title of District Court and Cause.]

NOTICE

To: Messrs. Brady & Nossaman, 433 South Spring St., Los Angeles 13, Calif.

You Are Hereby Notified that on May 27, 1949, a Notice of Appeal was filed by Defendant in the above-entitled case. A copy of which is enclosed herewith.

San Francisco, California, May 31, 1949.

C. W. CALBREATH, ECE
Clerk, U. S. District Court.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE ON APPEAL

The defendant herein having on May 19, 1949, duly filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered by the United States District Court for the Northern District of California in favor of plaintiff and against said defendant on March 28, 1949, and from the order denying defendant's motion for a new trial by said Court on April 19, 1949, now, upon application of said defendant and appellant, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and good cause appearing therefor,

It Is Hereby Ordered that said defendant and appellant have and is hereby given to and including August 17, 1949, for filing the record on appeal and docketing the cause with said Appellate Court.

Dated: June 21, 1949.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed June 21, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH THE DEFENDANT INTENDS TO RELY ON APPEAL

Defendant hereby designates the following as the points on which he intends to rely in the Appeal of said Cause to the United States Court of Appeals for the Ninth Circuit, this Designation to be filed with the Transcript of Record:

1. The District Court erred in making and adopting its Finding of Fact numbered IV in that said finding of fact is contrary to the evidence and is not supported by any substantial evidence in the record.

2. The District Court erred in failing to find as a fact that John Barneson was not indebted to plaintiff Muriel E. Barneson for any amount on January 1, 1941, or at any other time during the year 1941.

3. The District Court erred in making and adopting its Findings of Fact numbered X and XI in that said findings of fact are not supported by any substantial evidence before the Court and are contrary to said evidence.

4. The District Court erred in failing to find that any debt of John Barneson to Muriel E. Barneson, the plaintiff, that may have existed became barred by the Statute of Limitations and worthless prior to the commencement of the taxable year 1941, or has by reason of the insanity of Muriel E. Barneson and the consequent tolling of the ap-

plicable statute of limitations never become worthless.

5. The District Court erred in drawing its Conclusion of Law numbered II in that said conclusion is not supported by the evidence or by the facts found by the Court.

6. The District Court erred in failing to conclude that as a matter of law the debt in the amount of $150,000.00 which it had found as fact to be due from John Barneson to Muriel E. Barneson, the plaintiff, was voluntarily allowed to become outlawed and worthless by the inaction and failure of Muriel E. Barneson or Lionel T. Barneson, her guardian, to press for its payment by the debtor or his estate who were at all times solvent and abundantly able to pay the obligation, and said debt therefore did not qualify as a worthless debt within the meaning and intent of Section 23(K) (1) of the Internal Revenue Code as Amended.

7. The District Court erred in drawing its Conclusion of Law numbered III in that it should have concluded that as a matter of law plaintiff was not legally entitled to deduct the amount of $150,000.00 or any sum from her gross income for the taxable year 1941 as a bad debt when she, or her guardian, Lionel T. Barneson, had caused or contributed to the debt's worthlessness by voluntarily refraining from enforcing its payment when due by a solvent debtor abundantly able to satisfy the obligation.

8. The District Court erred in drawing its Con-

clusion of Law numbered IV in that the evidence before the Court and the facts found by it do not support a conclusion that plaintiff is as a matter of law entitled to recover any sum from the defendant in excess of $1,242.52.

9. The District Court erred in rendering judgment against the defendant for any sum in excess of $1,242.52 with interest thereon as provided by law.

Dated: July 29, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.
/s/ C. ELMER COLLETT,

Assistant U. S. Attorney, Attorneys for Defendant-Appellant.

[Endorsed]: Filed Aug. 2, 1949.

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To: the Clerk of the above-entitled Court, and to Messrs. Joseph D. Brady and Walter L. Nossaman, Attorneys for Plaintiff:

The defendant above, by its attorneys, hereby designates for inclusion in Transcript of Record upon Appeal the entire record before the District Court, including the following:

1. Complaint. (Filed 2-25-48.)

2. Answer. (Filed 5-11-48.)

3. Stipulation of Facts, including Exhibits A, B, B-1, C, D, E, F, G, H, attached thereto. (Filed 9-24-48.)

4. Stipulation to Correct Reporter's Transcript. (Filed 10-29-48.)

5. Reporter's Transcript. (Filed 11-9-48.)

6. Order for Judgment. (Filed 2-8-49.)

7. Order of Court. (Filed 2-18-49.)

8. Plaintiff's Objections to Defendant's Proposed Amended Findings of Fact and Conclusions of Law. (Filed 3-7-49.)

9. Letter of Joseph D. Brady. (Filed 3-9-49.)

10. Findings of Fact and Conclusions of Law. (Filed 3-25-49.)

11. Defendant's Proposed Amended Findings of Fact and Conclusions of Law. (Lodged 3-1-49.)

12. Judgment. (Filed 3-25-49.)

13. Certificate of Probable Cause. (Filed 3-25-49.)

14. Notice of Entry of Judgment. (Dated 3-29-49.)

15. Notice of Motion for New Trial. (Filed 4-7-49.)

16. Affidavit of Service of Notice of Motion for New Trial by Mail. (Filed 4-8-49.)

17. Notice of Denial of Motion for New Trial. (Dated 4-20-49.)

18. Statement of Plaintiff's Reasons in Opposition to Defendant's Motion for New Trial. (Filed 4-19-49.)

19. Order Denying Defendant's Motion for New Trial. (Filed 4-19-49.)

20. Notice of Filing Notice of Appeal. (Dated 5-31-49.)

21. Notice of Appeal. (Filed 5-27-49.)

22. Order Extending Time to File Record and Docket Cause on Appeal. (Filed 6-21-49.)

23. Statement of Points Intended to Be Relied Upon on Appeal.

24. This Designation.

Dated: August 2, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant-Appellant.

[Endorsed]: Filed Aug. 2, 1949.

In the Southern Division of the United States District Court for the Northern District of California

No. 27,929-G

LIONEL T. BARNESON, Guardian of Muriel E. Barneson,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,

Defendant.

REPORTER'S TRANSCRIPT

Tuesday, September 28, 1948

Appearances:

JAMES D. BRADY and
JAMES L. WOOD,
For the Plaintiff.

WM. E. LICKING,
For the United States. [1*]

Before: Hon. Louis E. Goodman, Judge.

The Court: Proceed, Counsel.

Mr. Brady: I am Joseph D. Brady, and my associate is James L. Wood. As you will see from the papers just handed to your Honor, Mr. Licking and counsel for the plaintiff have worked out a very carefully prepared stipulation of facts. We expect to have just one witness. The case is a Federal Income Tax case of Muriel E. Barneson, who

* **Page numbering appearing at top of page of original Reporter's Transcript.**

is an incompetent. The year involved is the year 1941. In Miss Barneson's 1941 return, she claimed a bad debt deduction of $150,000. While her gross income was large, it was less than $150,000, so that on her tax return there was no tax liability.

The Commissioner of Internal Revenue, after examination of that return, made three or four adjustments in gross income, on the deductions; all of them were of a minor character except the bad debt deduction. The Commissioner disallowed the $150,000 bad deduction, and all the adjustments taken together produce an asserted deficiency for the year 1941 of some $70,300.

The plaintiff chose to pay the tax with interest, and to file a claim for a refund. All those things were done. The Commissioner did not act upon the claim for a refund, to allow or disallow it within the six months provided in the Internal Revenue Code; and hence we brought this action.

The stipulation of facts contains one or two paragraphs near the end in which the parties dispose of two minor issues. The plaintiff abandoned one issue, and the Government has [2] conceded that Miss Barneson is entitled to an adjustment in her favor of some $1,606 in net income, which automatically entitles her, as paragraph 28 of the stipulation on page 20 shows, to a judgment in her favor for some $1,200—I beg your pardon, your Honor, that is paragraph 31, on page 21, some $1292, together with interest, even if your Honor, much to the chagrin of plaintiff's counsel, should rule the

Commissioner was right on the disallowance of the bad debt.

Now, we have narrowed the issue down to the bad debt deduction. That involves questions of fact. I think that the law is very clear. The Internal Revenue Code as in effect for this taxable year 1941, by an amendment in 1942 Revenue Act, which was made retroactive, permits taxpayers to take deductions for "debts which become worthless within the taxable year"; so the plaintiff must prove of course that on January 1, 1941, the first day of our taxable year, a debt was owing to this plaintiff, that it was a subsisting debt on that date, and that it had value on that date. In other words, that it had not become worthless on December 31, 1940, or in some prior year.

We have to go further and we have to show that, assuming that there was a subsisting debt on January 1, 1941, it became worthless during the calendar year and taxable year 1941.

The Court: In 1941, any debt, whether business or otherwise, demonstrated to be worthless could be deducted?

Mr. Brady: That is right, your Honor. [3]

The Court: Is that equally true in the case of losses through——

Mr. Brady: True of what?

The Court: Of business losses?

Mr. Brady: The capital gains and losses, yes.

Mr. Licking: Business losses incurred during the entire year.

The Court: That is not pertinent now. Go ahead.

Mr. Brady: I just want to observe, under this case, that the facts which are admitted in evidence, the stipulation of facts alone, I think your Honor is bound to conclude Miss Barneson could not, under the facts and the law, have claimed a deduction for this $150,000 in any prior taxable year to ours.

I think your Honor will conclude she had a valid subsisting debt, and it was valuable because, among other things, the stipulation states flatly at all times from the dates in 1928 and 1929 that Miss Barneson transferred this $150,000 to her father, and her father at all times had the requisite financial ability to have paid Miss Barneson $150,000 on demand; so we don't have any question of a bad debt resulting from the financial inability of the debtor to pay.

The Court: I don't quite get that.

Mr. Brady: Will you let me expand that?

The Court: Did the debt consist of some money the plaintiff had loaned? [4]

Mr. Brady: We claim it is a loan. In deference to the Government, they may suggest that the character of the money was not a loan. I will defer that to the point which I think your Honor wants to know——

The Court: What is the issue?

Mr. Brady: We claim the debt became worthless because it was barred by the California four-year statute of limitations. John Barneson died February 25, 1941, in this taxable year.

The Court: He was the man that owed the money.

Mr. Brady: He was the man that owed the money—we claim he owed money. He died.

The Court: The Barneson that was in the oil business?

Mr. Brady: That is right, Captain John Barneson.

The Court: Lived down on Central Avenue, didn't he?

Mr. Brady: I do not know. I am from Los Angeles.

Mr. Licking: That is correct, your Honor.

The Court: I remember when I was first married, that is, the first year of my marriage, I lived in a house owned by my wife's parents on Central Avenue. The fact is, if I recall correctly, Barneson lived a few houses away in that street.

Mr. Licking: That is my understanding. It is hearsay as far as I am concerned, but I believe that is right.

The Court: Muriel is a daughter of John Barneson.

Mr. Brady: Muriel is a daughter of John. Muriel is not present, and she is the creditor. John Barneson was the [5] debtor.

Mr. Licking: So you contend.

The Court: What is the issue? As to whether there was a debt, and as to whether it became worthless also?

Mr. Brady: That is right, two issues.

The Court: Are you going to produce any evidence besides the stipulation?

Mr. Brady: Yes, we are going to call Lionel Barneson who is the guardian of Muriel.

The Court: Why don't you do that?

Mr. Brady: I think it would be better if I could relate some of the facts stipulated there.

Miss Barneson has been adjudicated incompetent since April 3, 1936. She can't be here. She couldn't testify if she were physically present; actually, as Lionel Barneson will show, she became actually incompetent in March of 1931.

Mr. Licking: Mr. Brady—as you will offer to show by Lionel Barneson.

Mr. Brady: I can't hear.

Mr. Licking: As you will offer to show, rather than you will show.

Mr. Brady: Yes, that can be taken as implicit in anything I may say here.

Back in 1928, Harold Barneson, a brother of Muriel and Lionel Barneson, was in the stock brokerage business in San [6] Francisco and Los Angeles doing business as H. J. Barneson & Company. In 1928 and 1929 his stock brokerage business was expanding and he needed working capital; so he appealed to his father for some money in 1928. His father transferred $300,000 to Harold Barneson for use as working capital in the stock brokerage business. Of that $300,000 capital, Captain Barneson got $100,000 from Muriel, this plaintiff, and another $100,000 from his wife Harriet, who died in 1936; and the third $100,000 he got out of his own bank account; so that in 1928 Captain Barneson transferred $300,000 to Harold Barneson.

The checks which Muriel wrote to her father on her bank account, which he cashed and deposited in his bank account, as the stipulation of facts shows, are in the exhibit which is attached to the stipulation; and also the fact should be there is enough on those check stubs, notations made by Muriel at the time, which encourage the Government to suggest that, as I believe, the relationship between Muriel and Harriet and John Barneson was not debtor and creditor, but they were some sort of special partners, having a piece of an interest in Harold Barneson's interest in that stock brokerage business.

The Court: How much did these checks of Muriel amount to, that Muriel Barneson wrote?

Mr. Brady: All-told in 1928 and 1929, $150,000.

The Court: That is the $150,000.

Mr. Brady: In 1929 she gave another $50,000 and in 1929, [7] Harriet, the mother, gave another fifty, and in 1929, John Barneson of his own money transferred $25,000. It ended up at the end of 1929 there had been an aggregate transferred by John Barneson to Harold Barneson of $425,000, of which 150,000 he had got from Muriel, 150,000 from Harriet his wife, and 125,000 came out of his own bank account.

It is this relationship between Muriel and Harriet on the one hand, and John on the other hand, whether that is a debtor-creditor relationship, whether the three of them were some sort of partners—that I think is one of the factual issues in this case.

Of course, the Government, I think it is reasonable to assume they will argue it was not a debtor-creditor relationship between John Barneson and Muriel, or between John and Harriet.

The Court: Who do you claim is the creditor and who is the debtor? Harriet Barneson?

Mr. Brady: No, your Honor. We claim that John Barneson was indebted to his wife for $150,000, and that he was indebted to his daughter Muriel for $150,000; but the relationship was solely between them.

The Court: And you claim the statute ran on that, and therefore in 1941 it became a bad debt.

Mr. Brady: Yes. As I say, John died in 1941. Lionel Barneson, as the guardian of Muriel, filed in the probate proceeding down in Redwood City in John Barneson's estate a [8] creditor's claim on behalf of Muriel for $150,000, and a copy of that is in the stipulation of facts, your Honor. Martin Weil was acting as Lionel's attorney in Lionel's capacity as the executor of John Barneson's will.

Shortly following, as we will show by proof, upon John Barneson's death, Lionel and Martin went over John Barneson's books of account down in the Barneson building on Montgomery Street; and Lionel called Martin's attention to an account on John Barneson's books.

I wish your Honor would at this time turn to it; it is Exhibit "A" to the stipulation of facts; wherein John Barneson, the debtor, recognized his debt to his daughter Muriel in the amount of $150,000 and you will observe that he got $100,000 of it

in May of 1928 and another $50,000 in May of 1929.

When Mr. Barneson called that to the attention of Martin Weil, Martin as a lawyer said, "I think that claim is barred by the statute of limitations. It is more than four years old." Nevertheless the claim was filed with Judge Cotton.

The Court: In 1941?

Mr. Brady: On June 23, 1941.

The Court: Disallowed?

Mr. Grady: It was disallowed on that date.

The Court: On the ground it was barred by the statute?

Mr. Brady: That is right, and it was further stipulated, your Honor—it is in the stipulation showing that John Barneson—— [9]

The Court: It was barred by the statute away back in 1933.

Mr. Brady: That is right, your Honor. So far as we can tell, there was no basis for contending that the statute of limitations was suspended.

Mr. Licking: There was some barred in 1932, according to the stipulation.

The Court: Then the real question is, "Is a debt in existence in 1928-1929, becoming outlawed in 1933, the debtor dying in 1941, the claim being presented to his estate in 1941 and being disallowed, when if at all is it that the debt becomes worthless"?

Mr. Licking: That assumes a point—it was a debt.

The Court: Yes.

Mr. Brady: If it is a debt. I think your Honor

has phrased the issue. In connection with the loan, we have a four-page memorandum of points and authorities, or an outline thereof. The decisions have uniformly held——

The Court: I rather you didn't argue the legal aspects of the case, because of the fact that my time is so limited in the pile of cases, because of the heavy calendar. I would rather have you put on whatever evidence you have.

Mr. Brady: May I avert to one further fact in the stipulation of facts. I think you will understand the testimony better if I do. If your Honor will turn to Exhibit "F" to the stipulation of facts, there is the "Harriet E. Barneson [10] Loan Account." You will see on the credit side two entries; they are almost identical with the entries on the Muriel Barneson Loan Account on Exhibit "A." On the debit side of the Harriet Barneson Loan Account, you will see entries showing, following the death of Mrs. Barneson in 1936, Captain Barneson recognized the debt, as shown by his books, by making a payment to her estate.

As you read the stipulation of facts, you will conclude that the relation between Muriel Barneson and her father with reference to Muriel Barneson's $150,000 was identical to the relation between Harriet Barneson and John Barneson with respect to Harriet's $150,000. We say the evidence shows conclusively that Captain John Barneson recognized on his own books his debts to both of these people; and the fact he recognizes them meets the statute of

limitations, by paying the debt to his wife's estate, even though that was barred by the statute of limitations.

Admittedly, Harriet Barneson is dead, John Barneson is dead, Harold Barneson is dead, and Muriel Barneson is incompetent, so that we can't have the benefit of that testimony they might give.

Mr. Licking: Harold? You say Harold is dead?

Mr. Brady: Harold is dead. The stipulation states that. If your Honor wishes, I will call my witness.

Mr. Licking: I think from the statement by the plaintiff [11] here that the Government's position on the matter is outlined properly. Our contention, first, is that this was not in the ordinary sense of the word a debt, but that it is, as the evidence shows, and the facts in the stipulation of facts particularly shows here, to some extent it is a joint venture, an interest of joint venturers in the interest of John Barneson on account of advances made to the brokerage firm run by his son, to which the funds were advanced, including the sums from his wife Harriet, the $150,000 here, and the $125,000 he advanced out of his own funds.

The stipulation of facts shows that this was carried, as far as John Barneson was concerned, in a separate account. That is, there was another account with reference to Muriel, and that account had entries in it from time to time, after her incompetency and before that time; and this particular account which we, for the purposes of argument,

how a partnership account, or where it is not so set out, is at least set out in the books as a separate account.

In other words, there were two accounts carried in the books with Muriel Barneson. For that reason, if a debt, it is an unusual debt; and we feel that it is evidence of a joint venture between John Barneson, Harriet Barneson, and Muriel in the proceeds of John Barneson's interest in the brokerage firm; and, second, we contend that——

Mr. Brady: Do you mean John Barneson's interest in the [12] brokerage firm?

Mr. Licking: Yes, a joint venture of the three of them as to John Barneson's interest and participation in that interest.

The Court: Is there evidence as to the nature of John Barneson's relation?

Mr. Licking: There is evidence John Barneson himself was given a special partnership interest in this brokerage firm, to be advanced the money. There is evidence in the stipulation he was to participate in the profits.

The Court: Is there any dispute about the fact that John Barneson was not a creditor of Harold Barneson? Is that disputed? As far as John Barneson's relationship to the son was concerned, that was or that was not a creditor relationship?

Mr. Licking: John Barneson claimed a loss of the total amount of $425,000 on one of his income tax returns for the year 1932. That was the year when the brokerage firm went sour.

The Court: Is that allowed or not?

Mr. Licking: That was allowed, your Honor. It was never questioned. In that year he had a loss without it. He wouldn't have had any taxable income if the $425,000 was not allowed, and it was not questioned.

The Court: Of course, it would have been a loss to him even if he was a special partner. [13]

Mr. Licking: That is true.

The Court: Yes, go ahead. I think I have got that.

Mr. Licking: Now, covering that, we contend that the loss or the investment, that this was an investment in a joint venture with John Barneson in the business of a stock brokerage firm—not that Muriel had anything to do with it, not that Muriel Barneson was a partner in this brokerage firm; but she, Harriet and her father were partners in the investment of this money.

The Court: That would be inconsistent with this claim he lost $425,000 in the business, wouldn't it?

Mr. Licking: It would.

The Court: Ostensibly it would be inconsistent with that.

Mr. Licking: It would be inconsistent. It would be inconsistent in one sense, and he might still have guaranteed it. He might still have underwritten the investment himself personally; but at any rate, the facts show that it was not treated by him in his own bookkeeping system as his other accounts and other dealings with Muriel.

Now, Lionel Barneson, who was the executor of the estate of Harriet, and he served as the executor of the estate of John Barneson and also as the guardian of the plaintiff here, Muriel Barneson; acting under the law of the State of California, he is required to file an inventory of the assets of the estate of the incompetent. That inventory was filed within proper time, [14] apparently, after that declaration of incompetency; and while it contained much of the other assets in the estate of Muriel, other claimed assets, it contained no mention of this $150,000.

Each year since that time and up to the present, and up to the time of the filing of a claim in this estate, there was never any mention in the annual inventory of the estate filed of this particular claim.

Now, this claim became, there is a conflict as far as the cases are concerned, probably not resolved definitely one way or the other as to the exact meaning of what "became worthless" means. I will leave that for later, but the facts are that this claim, of whatever nature it was, if it was filed as an open book account, became worthless four years after the last payment or the last entry in that connection; and that so far as the books show, of John Barneson, there was no entry in this connection in this particular account subsequent to 1932.

It shows, however, that he divided it from the time his interest arose, and this money was transferred to the brokerage firm. The facts show he divided with Muriel and Harriet the proceeds which

he received each year from his investment in his interest in the brokerage firm. He divided those with Muriel and Harriet each year, proportionately to their respective investment of each of them in the partnership, if it be regarded as a partnership investment. [15]

The Court: Does that appear in the stipulation?

Mr. Licking: That appears in the stipulation.

Mr. Brady: If I might clarify one or two points on that.

We do not contend John Barneson never had some sort of relation with Harold Barneson which constituted John a special partner of Harold, the res being Harold Barneson's interest in the H. J. Barneson Company. However, the stipulation of facts show that as far as the H. J. Barneson & Co., John was not a member of that stock brokerage partnership during 1928 or 1929. However, they do further show that on January 1, 1930, the H. J. Barneson Company became a limited partnership, and that John became a limited partner with the contribution of $275,000, out of the $425,000 that he had previously transferred to Harold. That difference between $275,000 and $425,000 was assigned by John to his son J. Leslie, who became a general partner in H. J. Barneson & Co., a limited partnership; so that John used all of that $425,000 there.

Now, John remained a limited partner until Walsh and O'Connor, and H. J. Barneson & Co., merged or consolidated in December of 1930. John remained a limited partner in Walsh O'Connor &

Barneson to the extent of $275,000.

Now, it is true, as Mr. Licking said, H. J. Barneson stock-brokerage company went out of business with complete losses to all the proprietary partners in 1932. John Barneson on his 1932 return took a deduction as a loss for the entire $425,000, even though he had other losses in excess of his [16] income; so he got no tax benefit from taking $425,000 as a loss, but that was the amount of his investment, as shown by his books.

On the other hand, Muriel Barneson filed a 1932 tax return, on which she paid a tax of between eleven and twelve thousand dollars; and she did not take any loss deduction with reference to this stock brokerage enterprise. Now, however, as the Government contends, John and Harriet——

Mr. Licking: This is straight argument at this point. It has nothing to do with the statement of facts.

The Court: That is what I have suggested to you. The time is running short. Get whatever evidence you want in the record, plus the stipulation of facts, and then you can argue to your hearts content about it.

LIONEL T. BARNESON

called as a witness on behalf of the plaintiff sworn.

Direct Examination

By Mr. Brady:

Q. Where do you reside, Mr. Barneson?

A. 126 San Carlos, Sausalito.

(Testimony of Lionel T. Barneson.)

Q. You are the guardian of the person and estate of your sister, Muriel Barneson?

A. Yes.

Q. The plaintiff here? A. Yes. [17]

Q. Muriel Barneson will be 62 years of age next month? A. Yes, sir.

Q. When did—where is Muriel Barneson now?

A. Santa Barbara.

Q. She is attended by nurses? A. Yes.

Q. She would be unable to appear here and testify? A. No, she couldn't.

Q. She couldn't testify?

A. No, she couldn't.

Q. When did Muriel's mental illness begin?

Mr. Licking: If the Court please, that calls for an opinion of this witness on a question he is not competent to answer. He was asked the question "When did Muriel's illness begin"? I do not think he is competent.

The Witness: Your Honor, I think I can answer. It happened very suddenly.

Mr. Licking: I object to the question on the ground it calls for the conclusion and opinion of this witness.

The Court: Has there been any legal proceedings?

Mr. Brady: Yes, the stipulation of facts shows that she was adjudicated incompetent April, 1936. Mr. Barneson knows she became incompetent five

(Testimony of Lionel T. Barneson.)

years before that, and I want to have him testify to it.

Mr. Licking: I doubt that—— [18]

The Court: What is the materiality of that to this case? Does the fact that this plaintiff became incompetent in fact before she was adjudicated have any bearing upon the issues of the case?

Mr. Licking: I can't see how this witness can testify to it.

Mr. Brady: It has a bearing on this. The Government is going to argue, your Honor, neither Muriel nor her guardian ever made any demand on John Barneson for the payment of this debt. They are going to make whatever capital they can. Now, if in fact, Muriel was a sick person, actually incompetent, in March, 1931, on, your Honor can weigh that fact in your ultimate conclusion.

Mr. Licking: If that is a fact, it can be proven by competent testimony. Certainly if she was incompetent during that period she was attended by some physician or physicians who could testify to her mental situation.

The Court: I do not think that is a good objection. I know there are any number of California authorities to the effect that neighbors can testify to their opinion as to the sanity or insanity of a person.

Mr. Licking: As to their opinion as sanity or insanity; this witness was asked for a fact.

The Court: You can question him as to his opin-

(Testimony of Lionel T. Barneson.)

ion, and develop their relationship. Did she live with him, and [19] so forth?

Q. (By Mr. Brady): Mr. Barneson, were you in Santa Barbara on the day in March of 1931, that Muriel Barneson was seized with some sort of mental attack? A. Yes, I was.

Mr. Licking: I object to that as leading and calling for the opinion of the witness on a question he is probably not competent to discuss.

The Court: Well—did this sister live with him from 1931 on? Did he visit her, or not? What was their relationship?

Mr. Brady: He visited her.

The Court: I will overrule the objection. Let him answer the question.

Q. (By Mr. Brady): Have you got the question?

The Witness: Yes, I answered the question.

(Last question read by reporter as above reported.)

The Witness: March, 1931, and I was there, yes.

Q. (By Mr. Brady): Has Muriel ever been able to carry on her own personal business affairs since that time? A. No.

Q. You were appointed guardian April 3, 1936?

A. Yes, I was.

Q. By the Superior Court of Ventura County?

A. Yes. [20]

Q. And you have continued as guardian ever since April, 1936? A. Yes, I have.

(Testimony of Lionel T. Barneson.)

Q. Your attorney in this guardianship matter was Mr. Blackstock of Oxnard? A. Yes.

Q. Mr. Blackstock, he has in the last two years become a judge of the Superior Court?

A. Yes.

Q. Between March, 1931, and April, 1936, who handled Muriel's affairs for her?

A. My mother handled them under a power of attorney.

Q. Did Muriel ever make a will?

A. Yes, she did.

Q. Do you know the approximate date it was executed?

A. It was executed on May 31, 1930. I am going to have to correct my previous answer. The will was 1930. The day she was seized was 1931.

Q. I couldn't hear you.

A. The will was signed in 1930. The day she was seized with this attack was March, 1931.

Q. Do you want to check it?

Mr. Licking: It seems to be entirely immaterial whether she made the Will——

The Witness: This is photostated.

The Court: I can't see the materiality, but it appears to be harmless. [21]

Q. (By Mr. Brady): Are you named as executor in that Will? A. Yes.

Q. And your mother died April 14, 1936?

A. Yes.

Q. And the executors of your mother's estate

(Testimony of Lionel T. Barneson.)

were yourself, your brother Leslie, and the Bank of California? A. Yes.

Q. Where did you reside at the time your mother died?

A. In Burlingame with my mother and father.

Q. You lived with them, did you?

A. In the house with them, yes.

Q. And you had come up here from Los Angeles in 1935 in order to take care of your mother and father? A. Yes.

Q. And you continued to live in your father's household from 1935 until after the date of his death in February, 1941? A. Yes.

Q. Your mother's estate was probated in San Mateo County? A. Yes.

Q. Did you have any conversation with your father during the time the inventory of your mother's estate was in the course of preparation as to any assets your mother owned at the date of her death?

Mr. Licking: To which I object as immaterial and hearsay.

Mr. Brady: I promise your Honor I will connect it up. [22]

Mr. Licking: What is the purpose of it? It is in the stipulation.

The Court: Whether he had a conversation or not, if he had one, it is harmless. He asked if he had a conversation with his father concerning the assets of his mother's estate. I will overrule the objection.

(Testimony of Lionel T. Barneson.)

The Witness: Yes.

Q. (By Mr. Brady): Did your father tell you at that time he was indebted to your mother's estate?

Mr. Licking: To which I object on the ground it is hearsay and immaterial.

The Court: How are you going to get in the conversation of that nature into the record in this case? How are you going to avoid the rules of evidence?

Mr. Brady: If your Honor please, the stipulation of facts, if you have a chance to observe it, ties in this $150,000 that John Barneson borrowed from his wife with the $150,000 borrowed from Muriel; and we want to show John admitted to Lionel, admitted as one of the executors of Harriet's estate, he owed his wife's estate $150,000.

Mr. Licking: The facts are it was paid.

The Court: You have already called my attention to one of the exhibits here, one of the ledger sheets of John Barneson, which shows that he paid the $150,000 into his wife's estate, as a credit against the obligation of $150,000 which showed up on the opposite side of the ledger. I think that the conversation [23] would be subject to the objection.

Mr. Brady: In the same conversation I want to prove John Barneson said he also owed Muriel $150,000.

Mr. Licking: I am objecting to that if the Court please.

Mr. Brady: I haven't asked him the question. I have been dividing up my questions.

(Testimony of Lionel T. Barneson.)

The Court: Now, how are you going to get that into the record? A conversation with the father saying he owes the daughter $150,000.

Mr. Brady: I think that is perfectly admissible, your Honor, as evidence of a debtor admitting the debt—not only admitting the debt, but saying he was going to pay it.

Mr. Licking: I will make the same objection to that I made to the other, hearsay, your Honor.

The Court: Of course, it is hearsay, because it is a statement made by someone *who not* a party to this litigation, which is between the plaintiff and the United States.

Mr. Brady: Yes, but I do not think the hearsay rule applies in favor of the *United in* such a situation, your Honor. In any bad debt case, you have to prove the existence of the debt. If the debtor admits he owes a debt, if he mentions the debt and admits he intends to pay it, in the latter, the admission goes to the question of the value of the debt; and we expect to show that this debt owed by John Barneson to Muriel existed over into the taxable year 1941, especially in [24] view of the Government's contention that the relationship between John and Muriel——

The Court: I will admit the testimony, subject to a motion to strike. Let us see when we get all through how much bearing that has on the case. He wants to know what conversation you had with your father, and where was it, and who was present,

(Testimony of Lionel T. Barneson.)

first, on the subject of any alleged debt by your father to Muriel?

The Witness: I took an inventory——

Mr. Brady: The question was directed, first, to the alleged debt to Harriet, first.

The Court: Well, all right.

The Witness: I took an inventory——

The Court: Was it in the same conversation?

Mr. Brady: Yes.

The Court: All right.

The Witness: I took an inventory of my mother's estate down to my father, after she had passed away, and showed it to him.

Mr. Licking: About when was this?

The Court: Fix the time of the conversation and the place and who was present.

The Witness: That was shortly after my mother's death.

The Court: How soon after? [25]

The Witness: I would say within three weeks.

The Court: And where?

The Witness: The conversation took place in my father's bedroom in a house in Hillsborough.

The Court: Who was present?

The Witness: My father and I.

The Court: Go ahead. You may state the conversation.

The Witness: I showed him this inventory, and he said in addition to that he owed mother $150,000, "and I owe Muriel $150,000. I will have to pay

(Testimony of Lionel T. Barneson.)

mother because I believe under the law the executor has to sue for all moneys due, if they are not paid," and he said he would pay this and he would like to pay Muriel at the same time—he intended to pay Muriel, but it would reduce his income considerably, and he would prefer to defer it, and what did I think? Should he pay it now or later?

I told him Muriel's income was sufficient to meet her needs, she didn't need the money, and if he needed the income, I felt quite sure he did, I didn't see any reason to pay it at this time.

Q. Mr. Barneson, following the conversation which was referred to, did you examine John Barneson's book of account? A. Yes, I did.

Q. Following your——

The Court: This is already in the record covered by [26] stipulation?

Mr. Brady: That is right, but I want to know each time that he examined John Barneson's books——

The Court: Isn't that in the stipulation, too?

Mr. Licking: I stipulated it was in there. I don't know when he saw them.

The Court: We will take a brief recess and then proceed.

(Thereupon a recess was taken.)

(After Recess.)

LIONEL T. BARNESON

a witness sworn on behalf of the plaintiff, testified further as follows:

(Testimony of Lionel T. Barneson.)

Direct Examination
(Continued)

By Mr. Brady:

Q. I understand the last answer, Mr. Barneson in this conversation which you had with your father, he told you that he owed your mother $150,000, and would have to pay her executor; and he owed Muriel $150,000, and expected to pay her; and then he has this talk about whether he should pay her right then or later? A. That is correct.

Q. Did your father tell you where the debts to Harriet and Muriel he just referred to were evidenced?

A. No, he did not. I went up and asked Mr. Peterson, his bookkeeper, to show me the books.

Q. Did you find it?

A. I found this $150,000 he [27] owed mother, and the $150,000 he owed Muriel.

Mr. Licking: I can't hear.

The Witness: I found the one hundred fifty he owed mother, and the one hundred fifty he owed Muriel; and he owed mother another amount slightly under eight thousand dollars.

Q. (By Mr. Brady): In a different account?

A. In a different account.

Q. With Harriet E. Barneson? A. Yes.

Q. Was this account you found, under which John Barneson owed Muriel $150,000, the same debt upon which in 1941 you filed a creditor's claim against John Barneson's estate?

(Testimony of Lionel T. Barneson.)

A. Yes, it was.

Q. Now, this balance due your mother's estate was something slightly less than $8,000—did you include that as an asset in the Federal Estate Tax return of your mother? A. Yes.

Q. And pay a tax on it? A. Yes.

Q. And you also included as an asset of your mother's estate, the $150,000? A. Yes.

Q. That your father owed her? A. Yes.

Q. On the Harriet E. Barneson loan account?

A. Yes.

Q. And paid a tax on that? A. Yes.

Q. Is Exhibit "F" to the stipulation of facts a photostatic copy of the Harriet E. Barneson loan account you found in your father's books of account, following your conversation with him?

A. Yes, it is.

Mr. Licking: Now, here——

Q. (By Mr. Brady): In what manner did your father pay your mother's estate that $150,000?

Mr. Licking: To which I object upon the ground the question is immaterial. We have stipulated it was paid.

The Court: It shows in the ledger sheet how it was paid.

Mr. Licking: Yes. What is the materiality of the manner in which it was paid?

Mr. Brady: If your Honor please, Captain Barneson paid that debt by parting with securities, the

(Testimony of Lionel T. Barneson.)

income of which he needed; and I think that that special fact is important and material in this income tax case, because in a bad debt deduction case, the good faith of the debtor is important, when the debt itself is barred by the statute of limitations.

The Court: That only applies to the debt to Harriet Barneson, inasmuch as he didn't pay the $150,000 to his daughter. It wouldn't make any difference how he paid some [29] other debt, would it? I don't quite get the effect of your question.

Mr. Brady: The very fact he paid the mother $150,000, automatically reducing his income to a point where he preferred to delay the payment of Muriel——

Mr. Licking: I object to that. That is argument.

The Court: You can make that as an argument, and the witness has already testified to a conversation; and the record shows he sold 400 shares of Bank of California stock.

Mr. Licking: What was the question?

The Court: He asked the witness how his father paid it; and I call attention to the fact that the record shows, the stipulation of facts, shows how he paid it.

Mr. Licking: Yes.

Q. (By Mr. Brady): Will you turn to Exhibit "A," the stipulation of facts, Mr. Barneson. You saw the original of that account in your father's

(Testimony of Lionel T. Barneson.)

books of account when you examnied them shortly after your conversation with your father in Hillsborough following your mother's death?

Mr. Licking: To which I object on the ground it has already been asked and answered, that identical question. He has identified this.

Mr. Brady: We can get along faster if I can ask the preliminary questions.

The Court: This is "A." The answer is yes.

The Witness: Yes.

Q. (By Mr. Brady): Did the ledger page, that is, Exhibit "A," remain in your father's books of account from the time you first saw it until the present time? A. Yes, it did.

Q. From what your father said in the conversation to which you have testified, following your mother's death, that he owed Muriel, and expected to pay her, did you consider that your father was willing to pay the debt to Muriel of $150,000 at any time you as her guardian might request it?

Mr. Licking: I object on the ground it is leading and suggestive, argumentative, obviously calls for the conclusion and opinion of the witness.

The Court: I think so. Sustain the objection.

Mr. Brady: I would like to attempt to rephrase the question. I think I can, your Honor.

The Court: Yes.

Q. (By Mr. Brady): With reference to this $150,000 debt from your father to Muriel, as a result of the conversation you had with him, did you

(Testimony of Lionel T. Barneson.)

form any frame of mind or have any state of mind as to his willingness to pay that debt on demand? A. Yes.

Mr. Licking: I object on the ground it is immaterial whether he had such a state of mind or not. [31]

The Court: I do not think it makes any difference what the witness thought about it. What difference would it make what his attitude toward the debt was?

Mr. Brady: Merely this, if I owe you $100 and I meet you on the street and I tell you I intend to pay it, doesn't that make a difference? Isn't that evidence that the debtor intended to pay it?

The Court: I think we have to assume anybody who owes a debt has a legal responsibility to pay it.

Mr. Brady: This was barred by the statute of limitations, your Honor.

The Court: What of it?

Mr. Brady: If a debt is recognized by the debtor, and he says, "I intend to pay it," and he is able to pay it, you could collect on demand. That goes to the question of the value of the account receivable.

The Court: There would have to be some acknowledgment in writing under California law.

Mr. Brady: I don't mean toward collectibility on a suit; I mean a debt may have value to the creditor, even if barred from collection by suit, if the debtor is an honorable person and has the

(Testimony of Lionel T. Barneson.)

financial ability to pay, and has said, "I intend to pay it."

Mr. Licking: That is all in the record. This is all argument. Certainly what this witness believed is not important. The testimony is in the record of the conversation [32] already.

The Court: I think you have already had in the record what the man who owed the obligation said about his intention, his state of mind; the state of mind of this witness wouldn't make any difference. I don't see how that would make any difference.

Mr. Brady: Bearing in mind that this witness is the guardian of this creditor.

The Court: Yes, but he didn't become the guardian until 1936.

Mr. Brady: Yes, but this conversation took place after April 3, 1936. His mother died eleven days after.

Mr. Licking: He was appointed guardian April 3rd. The mother died April 14th, 1936.

Mr. Brady: That is right.

Q. At the time of that conversation, were you personally familiar with the financial ability of your father to pay?

Mr. Licking: Stipulate at all times he was able to pay it. That is in the stipulation of facts.

Mr. Brady: I think we are entitled to show that this man, representing the creditor, knew about the debtor's financial ability.

The Court: Of course, he did know. No use

(Testimony of Lionel T. Barneson.)

wasting time on things like that. I guess members of the family were all more or less the beneficiaries of the father's wealth. [33]

Mr. Brady: I am awfully hard of hearing, your Honor; I didn't hear you.

The Court: Why waste time going into matter of that kind? I guess members of the family were fairly well familiar with the father's affairs and ability to pay money, as do all children of affluent parents.

Mr. Brady: Of course I have only a few more questions, your Honor.

Q. Between the time of this conversation, following your mother's death, that you had with your father, and the date of his death, February 25, 1941, was there ever a single day when he couldn't have paid that debt to Muriel on demand?

A. No.

Mr. Licking: We have stipulated to that, Counsel. It is not a proper question. I move it be stricken.

The Court: All right, granted.

Q. (By Mr. Brady): Following the conversation, or at any later time, before his death, did Captain Barneson ever state he had changed his mind about paying Muriel's debt? A. No.

Mr. Licking: I object to what he didn't do. It is negative evidence and doesn't mean anything.

The Court: I don't see how a man could change his mind about his legal obligations.

(Testimony of Lionel T. Barneson.)

Mr. Brady: It was barred by the statute. [34]

Mr. Licking: I don't know whether it was barred in April of 1936 or not. I should say it was not. There were assets according to our stipulation, of the partnership paid out in 1932, later in 1932 than the date of this conversation in 1936; so that at the date of this conversation, I won't stipulate it was barred; because I doubt it. In other words, I would say that the claim was barred at this date, when there were payments in 1932. That is the stipulation.

Mr. Brady: Payments of interest in 1932.

Mr. Licking: You say interest, and I say on account of the interest in the business of the partnership; but there were payments in 1932, later than April of 1932; so that this was not barred in 1936 at the date of this conversation.

Mr. Brady: Your Honor said he couldn't resist payment. Well——

The Court: Counsel, can we assume that the fact is that the father, assuming that this was a debt, intended to pay it, or never evidenced any intention not to pay it; but he never did pay it, and he died without paying it. Those are all the uncontroverted facts, aren't they? I take it they are from what both of you have said.

Mr. Brady: Yes, but we should show your Honor——

The Court: The question is No. 1, is a debt created by this transaction; and No. 2, is it barred by

(Testimony of Lionel T. Barneson.)

the statute of limitations so as to be a worthless debt under the test of [35] the tax statute?

No matter how much you dress it up, by having testimony that the father said, "I love my daughter and I will pay it to her," but he died without paying it, and your position is that that is the year it became worthless. It seems to me it is a wholly legal question, not factual. I don't know what this witness can testify to concerning it. Obviously he had no part in the original transaction. However, you develop anything you want for the record. I am not trying to stop you.

Mr. Brady: Here is one element of proof. I think your Honor will conclude, as we have, where the debt is barred by the statute of limitations, it does not lose its value by reason of that, if the creditor will pay nevertheless; but we have to show that, even though this debt was barred by the statute of limitations on January 1st, of 1941, the first day of our taxable year, we have got to show notwithstanding it was barred by the statute before that date, it nevertheless had value. We have got to go further and show in the taxable year of 1941, it had value; and if John Barneson in 1937 had said, "I owe Muriel, I intend to pay her," when he had the financial ability to pay, and he said he would, the debt would have value, even though it was barred by the statute of limitations.

The Court: That is in the record. That is a legal question.

(Testimony of Lionel T. Barneson.)

Mr. Brady: Suppose in 1938 he had told Lionel "I am [36] going to change my mind. I will not pay."

Mr. Licking: Isn't that up to me to prove that?

The Court: You have got your prima facie showing. The rest of it becomes argument, or is up to the other side.

Q. (By Mr. Brady): Mr. Barneson, on the date the Creditors' claim was filed against your father's estate, in the court house in Redwood City, did you go down there? A. Yes.

Q. Your attorney was Martin Weil?

A. Yes.

Q. Did he go into the Judge's chambers?

A. Yes.

Q. Did you go into the chambers with him?

A. No.

Q. He came out; did he tell you that the Judge had rejected the claim? A. Yes.

Mr. Licking: That is entirely immaterial and hearsay.

The Court: Yes.

Mr. Licking: The record shows it was rejected because barred by the statute of limitations.

Q. (By Mr. Brady): Mr. Barneson, did Muriel Barneson ever keep any books of account?

A. No.

Q. Mr. Barneson, Mr. Licking and I in working out the stipulation [37] of facts, included in it a statement on page 18, lines 1 to 4, that Muriel's

(Testimony of Lionel T. Barneson.)

claim of $150,000 against her father, "Was never listed or mentioned in any inventory filed in the court having jurisdiction over the incompetent's guardianship estate."

Mr. Licking: You say I requested it? We stipulated that that was a fact.

Mr. Brady: We stipulated it was a fact.

Q. Will you kindly explain why this was not done?

Mr. Licking: To which I object on the ground it is incompetent, irrelevant and immaterial. Why it was not done, does not matter; it was not done.

The Court: Well, the question is so broad it calls for all sorts of opinions of the witness.

Mr. Brady: I won't press it.

The Court: He can state any facts connected with the matter.

Mr. Brady: I won't press the question.

Q. Mr. Barneson, in connection with the preparation for this trial, did your counsel ask you to search the records of Muriel and Harriet, and John for their old income tax returns? A. Yes.

Q. Did your counsel ask you to see if those files contained any such copies of any United States partnership income tax returns, naming Harriet, John, and Muriel as partners? [38]

A. Yes.

Mr. Licking: Well, it is immaterial, the conversation between him and counsel.

(Testimony of Lionel T. Barneson.)

Q. (By Mr. Brady): Did you find any such returns? A. No.

Mr. Licking: I object to the question on the ground, first, the search is immaterial, and second, the colloquy, the conversation between counsel and his client is improper.

The Court: Sustained.

Mr. Licking: It has no bearing on this.

The Court: I will sustain the objection.

Mr. Brady: You may cross-examine Mr. Barneson, Mr. Licking.

Cross-Examination

By Mr. Licking:

Q. Mr. Barneson, did you have anything to do with either of these——

Mr. Brady: Mr. Licking, I wonder if I could ask the courtesy of your moving here so that I could hear you better.

Q. (By Mr. Licking): Were you yourself connected with either of the brokerage firms that have been mentioned here?

A. I was after my brother Harold lost all of his money. My father asked me to try to go in and salvage something.

Q. When was that?

A. That was around 1930, I believe.

Q. 1930. Then you were familiar with the partnership [39] affairs?

A. No, I was not particularly familiar with the

(Testimony of Lionel T. Barneson.)

partnership affairs. I went in and tried to sell the business.

Q. You went in there to try to sell the business?

A. I knew nothing about the brokerage business.

Q. In the course of selling it, did you get some idea about the assets of the partnership business?

A. I knew—what do you mean by that? Such as the financial——

Q. Did you know where the money had come from that went into the partnership?

A. Yes, I knew my father had transferred some money—I knew he had loaned my brother some money.

Q. Didn't you at that time know your father had gotten money for that purpose from Muriel and your mother? A. No, I didn't.

Q. You didn't know that? A. No.

Q. When did you first know that?

A. The first time it was called to my attention is when he told me he owed the money to my mother and sister.

Q. That was shortly after your mother's death?

A. Yes, it was.

Q. You were appointed guardian of your sister's estate in April, April 3rd?

A. April 3, 1936.

Q. Yes, that is right. Prior to that time, you say that [40] you considered she had been, you yourself thought she had been incompetent for some time? A. Yes, she had.

(Testimony of Lionel T. Barneson.)

Q. Had you been managing her affairs prior to that time?

A. No, my mother had under a power of attorney.

Q. Your mother had under a power of attorney?

A. Yes.

Q. At that time did you examine her books of account?

A. No, I didn't. I had come up from Los Angeles in 1935 to take care of my mother and father.

Q. Yes.

A. And mother was still handling Muriel's affairs, and when it was decided to have me appointed guardian my brother thought I should have Mr. Blackstock of Oxnard to handle—to act as attorney. I didn't know Mr. Blackstock, but my brother told me to send him a list of Muriel's assets.

Q. To act as attorney for Muriel?

A. That is right, in the guardianship.

Q. Yes. That was in 1935?

A. That was in March of '36, I believe it was.

Q. When did you decide to have a guardianship proceeding taken with reference to your sister, or the family?

A. It was sometime probably in January of 1936.

Q. In January of 1936?

A. We first started to discuss it then. [41]

Q. You discussed it with your father and mother at that time? A. Yes.

(Testimony of Lionel T. Barneson.)

Q. And with your other brother?

A. First, my mother and father, and later with Harold.

Q. Later with Harold. Then the decision was made among the family that you be the guardian?

A. Yes.

Q. At that time did you have any discussion as to the family financial situation?

A. No, I didn't.

Q. None at all?

A. I had a book of Muriel's investments, a small book in which the record of her investments was kept. She had always kept it in the same type of book, and I copied the figures of the securities which she held from that book, and sent the list down to Mr. Blackstock.

Q. Have you any idea where that book is now?

Mr. Brady: I have got it right here.

The Witness: Mr. Brady has it.

(Mr. Brady hands book to counsel for the Government.)

Mr. Licking: This just shows a list of securities.

A. Securities and income, I think, from those securities.

Q. Securities and income from those securities.

Mr. Brady: Don't you think we ought to identify the book, Mr. Licking, to which you are directing the witness's attention? [42]

Mr. Licking: You said it was the book.

Mr. Brady: It has got a title on the cover.

(Testimony of Lionel T. Barneson.)

Mr. Licking: I haven't intended to ask any specific questions about it. On the cover it shows "Record of Investments and Income," a printed form book for that purpose apparently.

Q. And this is the book given you by whom?

A. That is not the book that my mother kept a record of Muriel's investments in. I think I recopied those investments into the same type book which you hold in court.

Q. Whose handwriting is this? That is what I want to get at? A. May I see it?

(Mr. Licking hands book to witness.)

The Witness: That is my handwriting.

Q. That is your handwriting. Then this isn't the book that Muriel kept?

A. Well, I have the other book.

Q. I just asked you this one question, this is not the book Muriel kept?

A. No, not this one.

Q. Where is the other one?

The Witness: Have you got that, Mr. Brady?

Mr. Brady: I have never seen it.

The Witness: Miss Chase has it in the office. The [43] book was full, and I transferred from one book to another, the figures of the securities.

Q. This book isn't full now?

A. No, this is the last book. The other book was full. That is why I bought a new book and transfered to the new book. That is why it is in my handwriting.

(Testimony of Lionel T. Barneson.)

Q. Let me understand: You say the old book was full, and you transferred because the old book was full?

A. Yes. There was no room to make any more records?

Q. Is this supposed to be Muriel's record or yours?

A. That is—you mean the one we have here.

Q. Exactly? A. No.

Q. The one we were questioning you about?

A. That is not the record she kept herself.

Q. This is not the record she kept herself?

A. No, that is correct.

Q. Where is the record she kept herself?

A. I believe I have it in the safe in the office.

Q. Did you ever show it to Mr. Brady?

A. I am quite sure I did.

Mr. Brady: I haven't any recollection.

The Witness: I thought I showed you all of those books.

Q. (By Mr. Licking): Both of those books, what is the other book? [44]

A. Some of them my mother kept the record in the same type of book.

Q. Your mother kept a record in the same type of book that Muriel did? A. Yes.

Q. Of her investments and income?

A. Yes.

Q. Is it a record of all the income?

(Testimony of Lionel T. Barneson.)

A. Yes, I think all of the income—I couldn't say that.

Q. All the income of her securities?

A. I think it is. I don't know. I was not here——

Q. Over what period did that book extend?

Mr. Brady: Just a minute. The book is the best evidence of its contents.

Mr. Licking: I want to find out; it is not here. This is preliminary. I want to find out if the book is worth holding up the proceedings to get.

The Court: I will overrule the objection.

Q. (By Mr. Licking): What period did this book cover of Muriel's investments and income?

A. I couldn't tell you, probably from—well, I would hesitate to guess. Probably four or five years. Probably six years, before this book was used; I started the second book here, copying from another book that is also on file in the office. [45]

Q. Was copied by whom? A. What?

Q. You say the assets in the second book were copied from another book; copied by whom?

A. In the case of the book I have, they were copied either by my sister or mother. I was not here.

Q. What dates would they cover?

A. I won't try to tell you.

Q. I understand your testimony this way, this book is not complete; there is another book prior to this book?

A. No, this book contains everything that the

(Testimony of Lionel T. Barneson.)

other book contained, unless the securities were sold or something of that kind.

Q. Unless the securities were sold?

A. Yes.

Q. What is the first date in this book?

A. Well, 1936.

Q. 1936 is the first date in the book?

A. Yes.

Q. Your sister became incompetent, you say, in 1945, or was declared incompetent?

A. No, sir, she was declared incompetent.

Q. In 1936; and you say that this is a correct copy of the book she kept of her investments?

A. That is correct. [46]

Q. And is a total list of them. Well, state whether the date of the first investment in there is 1936?

A. No, the first investment is not dated 1936. The actual investment is in the year 1926. That is the year stated in which she made those investments. She might have purchased those investments some other year. I know she did purchase in 1929 and 1928——

Q. '28 and '29?

A. Yes. I happen to know the Amerada Corporation she bought that on May 1, 1928.

Mr. Licking: I wonder if that other book could be made available for my examination.

Mr. Brady: I want to know what book you are talking about.

(Testimony of Lionel T. Barneson.)

Mr. Licking: The same book we want to go on, the only book I am talking about is the book which the witness says he saw, which was a list of investments by Muriel, or Muriel's investments and income, which he got after her adjudication.

The Witness: I am not testifying it was kept by Muriel. It might have been kept by my mother. It might have been a book previously kept by Muriel.

Q. (By Mr. Licking): This book isn't the book kept by Muriel or your mother; this is a copy you made?

A. That is correct. That book was kept by me.

Q. (By Mr. Brady): Mr. Barneson, do you recall that from the question of your so-called——

The Court: Counsel, let counsel finish his cross-examination and then you can proceed to examine the witness, if there is anything he develops.

Q. (By Mr. Licking): Where is the other book from which you copied, state you copied this?

A. It is in my safe.

The Court: He has said several times it is in his safe, down in his office.

Mr. Licking: In your office here?

A. Yes.

Mr. Licking: No more questions on that line.

Q. Now, could that book be made available? Could you get that to court here?

A. Yes, sir.

Mr. Licking: I would like, your Honor, to ex-

(Testimony of Lionel T. Barneson.)

amine that particular book. It may be there isn't anything material in it. If there is, I would be quite certain Mr. Brady and I can stipulate.

The Court: You are entitled to have the book produced.

Mr. Licking: I don't like to have a trial held up. I would like to have the book produced by Mr. Barneson; if there is anything, I will make an appropriate motion to reopen and add that.

Mr. Brady: At the conclusion of the hearing today, Mr. Licking and I can go to Mr. Barneson's office and he can examine it. [48]

Mr. Licking: I don't want to go to Mr. Barneson's office.

The Court: The witness can turn over the book to you and you can, in turn, let Mr. Licking see it.

Mr. Licking: Yes.

The Court: That is fair enough.

Q. (By Mr. Licking): Do you know when you filed your inventory in the estate of the guardianship?

A. I filed my inventory before the—sent it down to Mr. Blackstock before the 3rd of April, sometime in March; and I sent it to Mr. Blackstock for filing. I didn't go down to Ventura.

Mr. Brady: That was 1936 you are talking about.

Q. (By Mr. Licking): In 1936? A. Yes.

Q. Do you know when it was filed by him?

A. What I was told, it was the day of the guardianship proceeding; but I don't know. I imagine it would be.

(Testimony of Lionel T. Barneson.)

Q. You believe it was filed the same day you qualified as guardian?

A. I don't know. I assume that would be a matter of record down in the court house at Ventura.

Q. That is a matter of record in the court house at Ventura. We can check that. You don't know when it was filed. This would also be a part of that inventory, this debt? A. No. [49]

Q. You wouldn't know about it?

A. I didn't know of the debt at that time.

Q. You filed an annual account after that every year, didn't you? A. Yes.

Q. Did you ever at any time request payment from your father of this account, before you filed the claim against his estate?

A. No, I didn't.

Mr. Licking: I think that is all.

Redirect Examination

By Mr. Brady:

Q. Mr. Barneson, this book that I show you, called a record of investments and income, does that list anything in it about securities? A. No.

Q. Does it list any income other than dividends or interest? A. No.

Q. Did you ever attempt to have it list anything but dividends or interest income?

A. I do not think there is anything but dividends or interest income that came in during the time I was handling her assets.

(Testimony of Lionel T. Barneson.)

Q. Mr. Barneson, when did you first show me this book? Is my recollection correct you told me that you have copied the material that appears in here from a similar record that had been kept by your mother and Muriel?

A. I am quite sure I told you that either my mother or Muriel [50] left off in the old book—but the old book will show my mother's handwriting.

Q. To the best of your knowledge was Muriel able to keep any record such as this during the years 1933, 1934, 1935, and 1936?

A. Not from 1931 on.

Q. So if Muriel kept a book it was prior to 1931? A. Yes.

Q. Did I ever ask you to show me that?

The Court: What difference does that make?

The Witness: I don't recollect.

Mr. Brady: That is all I have, your Honor.

Mr. Licking: No further questions. Of course, I want to see the other book.

The Court: We have covered that. Is that all, Mr. Brady.

Mr. Brady: That is all. I would like the record to show that Mr. Licking has never asked me to produce anything that I have failed to produce.

Mr. Licking: That is true.

The Court: It just developed in the cross-examination that there was this book?

Mr. Licking: I had never heard of this book before. It might have some bearing.

Mr. Brady: The respondent rests as far as any testimony concerned, and as far as any documentary proof is concerned? [51]

Mr. Licking: The Government will rest on the documentary proof already in the record, with an understanding with Counsel if there is anything material in the book, I may offer it. If there is another piece of documentary evidence that I consider material, I would like to offer it.

The Court: I suppose you gentlemen will want to file some memoranda.

Mr. Licking: Counsel filed an opening memorandum today. I do not know whether he wants to file a more elaborate memorandum or not.

The Court: I have just glanced hurriedly at it. Apparently it is the plaintiff's contention that the statute of limitations itself does not necessarily make a debt worthless for the point of view of tax law but merely fixes the period beyond which the creditor cannot sue.

Mr. Licking: That is correct.

The Court: And he has cited some cases. I suppose that the Government will want to file some replies.

Mr. Licking: Yes.

Mr. Brady: We would like to file a brief.

The Court: I haven't had a chance to read the stipulation. It is quite lengthy.

Mr. Licking: It is.

The Court: I think so. Do you wish to file any further memorandums? [52]

Mr. Brady: Yes, I do, your Honor.

The Court: Opening memorandum?

Mr. Brady: Yes; and the reply. Is that to be sent up here?

The Court: Yes.

Mr. Brady: I would like to do that.

The Court: What time would you suggest?

Mr. Brady: Ten days before we get the transcript—I haven't had any vacation.

The Court: Thirty days.

Mr. Brady: Thirty days will be ample.

The Court: To file the opening memorandum. How long will you want?

Mr. Licking: I should like 40.

The Court: Suppose we say, 30, 30, and 10.

Mr. Brady: Could it be 30, 30, and 15?

The Court: 30, 30, and 15.

Mr. Brady: That is all right.

Mr. Licking: Make my time 40 days.

The Court: I am really become quite a cynic on fixing time for briefs. No matter what time I fix both attorneys come around with the stipuations to extend.

Mr. Brady: I don't ask for extensions, your Honor.

The Court: Most attorneys do, however.

Mr. Licking: 40 days for me. [53]

The Court: 30 for Mr. Brady, 40 for you and 15 for Mr. Brady.

Mr. Brady: Yes. I will try to get mine in before the 30. Just a minute, if I may, your Honor. Mr.

Wood and I planned to ask for something further this afternoon. I would like it if Mr. Licking could oblige me by going to Mr. Barneson's office and getting out the books so that if he decides there is nothing in it he wants to bring out to the attention of the Court, we needn't worry about that in our briefs.

Mr. Licking: I would like some time to examine the book. In fact, I would like to have it examined by the accountant here.

The Court: Why don't you have the book delivered to you this afternoon by Mr. Barneson and you can turn it over to Mr. Licking, and get his receipt to you.

Mr. Brady: I am leaving for down South. I won't be able to deliver it to him.

The Court: If there is nothing he wants to do about the matter that will be the order; of course, if he wants to reopen the case, he will have to take it up with you.

Mr. Brady: One further point, your Honor. I think it is quite proper, since the Government has taken the position that Harriet, John and Muriel Barneson were partners, that they produce, if they are in existence, any partnership income tax returns of Harriet Barneson, and Muriel and John that may be [54] filed with the Bureal of Internal Revenue, and with that in mind I wrote Mr. Licking a letter on July 18th, and suggested that he get all pertinent tax returns here; and he tried, he told me to find

them—he told me he wrote a letter to the Bureau and they wrote they didn't have them; but I am now narrowing the question to the partnership income tax returns; Harriet, John and Muriel as partners. If there was any returns, we feel that it would be fair with us for the Government to produce them; and even though the records would have been sent to Washington, the Collector here would have a record of the filing of the return.

The Court: Return of information.

Mr. Brady: That is right.

The Court: Partnership return of information?

Mr. Brady: That is right. If, as the Government contends, that, legally, John and Harriet and Muriel were partners presumably they filed a partnership information return. If there is one, that is evidence. We want to see that partnership return.

Mr. Licking: That is negative evidence, and consequently a matter for argument.

The Court: It would be only self-serving.

Mr. Brady: Not at all. If they were partners, why, they are required to file a return. There is a legal presumption that every one acts legally. There is a presumption your Honor filed his Federal Income Tax return. [55]

Mr. Licking: You mean there is a law requiring separate partnership returns be filed.

Mr. Brady: There is precisely, precisely. That is why I am making my request.

The Court: I don't know whether that was the law in 1941.

Mr. Licking: In the first place I don't consider it proves anything. It proves nothing.

The Court: Well, irrespective of all that, all that I have before me now is the stipulation facts, plus the exhibits attached to the stipulation, and all of the evidence concerning the nature of the relationship in this matter between the father and daughter.

Mr. Brady: Well, the record now shows a request to produce such partnership tax returns as might have been filed.

The Court: The record now shows it, for what it is worth in the record.

Mr. Licking: Then I would make one request. I have discussed it with Counsel before. I want to bring the accounts of Muriel and Harriet with John here to date, to show what the treatment of those accounts was during the period they run. They run here merely to—both accounts shown here run merely to 1929. The ledger sheet shows entries up to 1941.

Mr. Brady: End of 1931, I think, Mr. Licking.

Mr. Licking: No, there are transactions in the accounts in 1941, and up to 1941, showing that there were [56] claims—showing that the account between Muriel Barneson and John Barneson was active and open during that period. That is something that I hadn't known until I discussed it. I can, if I may, put the agent on the stand for that one question; he has examined those records.

The Court: I don't know what you gentlemen are talking about. Have you submitted this case? Is this some other evidence, or are you arguing about something?

Mr. Licking: I asked if the counsel would have any objection to my putting in the other ledger sheets, showing the Muriel and John Barneson account was kept open up to 1941, and did not close in 1928 and 1929.

The Court: Are you referring to Exhibit A and B-1.

Mr. Brady: B and B-1 is the so-called open account.

Mr. Licking: The exhibits B and B-1 showing the accounts up to 1931. I am just informed that the account was open and active up to 1941 and I wish to put in those other sheets, by putting on the agent.

The Court: Are they available, are they available?

Mr. Licking: I am speaking of Muriel now. Yes.

Mr. Brady: Your Honor, I have been working on this stipulation ten days. I have no desire to keep out anything that should be in.

Mr. Licking: If I may, your Honor, reopen for a moment. I will put the agent on the stand and ask him just a few questions with reference to the account. [57]

Mr. Brady: That may dispose of it. That may dispose of it.

LOUIS SHEVLAN

recalled, having been previously sworn.

Direct Examination

By Mr. Licking:

Q. Mr. Shevlan, you are an agent of the Internal Revenue Department?

A. That is correct.

Q. In what capacity?

A. Well, my title is Internal Revenue Agent.

Q. I see. Did you participate in preparing the investigation for refund which is the basis of this suit?

A. I didn't participate in the refund examination. I made the original examination of the case.

Q. You made the original examination of the case; in the case of that examination, did you have occasion to see the books of account kept by John Barneson? A. I did.

Q. Particularly with reference to the Muriel E. Barneson account? A. That is correct.

Q. There were two accounts in the name of Muriel E. Barneson, one of which is Exhibit A now in evidence, and the other is Exhibit "B" and B-1.

A. That is correct. They are, Exhibit B and and B-1 are not complete.

Mr. Brady: Are not what?

A. Beg pardon.

Mr. Brady: I didn't hear the last.

A. I said Exhibit B and B-1 are not complete. The complete accounts of Muriel Barneson are on the books of John Barneson.

(Testimony of Louis Shevlan.)

Mr. Licking: Exhibit A is complete on that sheet? A. Yes.

Q. You say Exhibit B and B-1 are not complete, not necessarily in that one sheet?

A. They are not complete here, where they end December 31, 1931, I believe the account on the books was open up until 1941.

Q. And there were transactions reflected in that account? A. Until 1941.

Q. Until 1941, advances and——

A. Debits and credits?

Q. Debits and credits up until 1941?

A. That is right.

The Court: Did they have anything to do with this matter of the $150,000 transaction with the father?

A. Well, sir, that question is a legal question, I believe, as to whether or not these advances and these transactions in the Muriel E. Barneson account would keep the statute open.

Mr. Licking: That was the question. [59]

The Court: Were there any entries affecting the entries included in the stipulation here, that had to do with the so-called $150,000 transaction that is involved in this case?

A. Specifically relating to the $150,000, no sir.

Mr. Brady: I didn't get that.

The Court: He said no sir.

Mr. Brady: No sir.

(Testimony of Louis Shevlan.)

Q. (By Mr. Licking): They were other transactions? A. Yes.

Q. Debits and credits between Muriel and John Barneson? A. That is correct.

Cross-Examination

By Mr. Brady:

Q. Could you point out to us those entries that appear in Miss Barneson's account?

A. I have a statement. There were other charges made against the open account of Muriel E. Barneson on the books of John Barneson, in the year 1941, and the years immediately preceding. What the nature of those items are, I haven't gone into; but there were debits and credits of various kinds. It is an open account.

Q. But was a separate account from the Muriel E. Barneson loan account?

A. One account is entitled "Muriel E. Barneson," and the other account is entitled "Muriel E. Barneson Loan Account." [60]

The Court: Does that cover it?

Mr. Licking: That covers what I want, your Honor.

The Court: Case may stand submitted: 30, 40, and 15.

Mr. Brady: Mr. Wood informs me Mr. Barneson left some time ago to go and get that book.

The Court: You gentlemen can arrange that between you. I am not going to hold court in session

for that. If there are any further proceedings you can reopen.

Mr. Licking: Yes, if it is necessary to reopen the case, we can make the application.

(An adjournment was taken until Wednesday, September 29, 1948, at 10:00 A.M.) [61]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying document and Exhibits, lisited below, are the originals filed in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint to Recover Incomes Taxes.

Answer.

Stipulation of Facts.

Stipulation to Correct Reporter's Transcript.

Order for Judgment.

Order of Court.

Defendant's Proposed Amended Findings of Fact and Conclusions of Law.

Plaintiff's Objections to Defendant's Proposed Amended Findings of Fact and Conclusion of Law.

Letter of Joseph D. Brady.

Findings of Fact and Conclusions of Law.

Judgment.

Certificate of Probable Cause.

Notice of Entry of Judgment.

Notice of Motion for New Trial.

Affidavit of Service by Mail of Notice of Motion for New Trial.

Statement of Plaintiff's Reasons in Opposition to Defendant's Motion for New Trial and List of Authorities on Which Plaintiff Relies.

Order Denying Defendant's Motion for New Trial.

Notice of Denial of Motion for a New Trial.

Notice of Appeal.

Notice of Filing Notice of Appeal.

Order Extending Time to File Record and Docket Cause on Appeal.

Statement of Points on Which the Defendant Intends to Rely on Appeal.

Defendant's Designation of Contents of Record on Appeal.

Exhibits Accompanying Stipulation of Facts, to wit: A, B, B-1, C, D, E, F, G and H.

Reporter's Transcript for September 28, 1948.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 5th day of August, A.D. 1949.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12320, United States Court of Appeals for the Ninth Circuit. James G. Smyth, Collector of Internal Revenue, for the First District of California, Appellant, vs. Muriel E. Barneson, also known as Muriel Elfrida Barneson, an Incompetent Person, by Lionel T. Barneson, Guardian, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 5, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12320

JAMES G. SMYTH, Collector of Internal Revenue,
Appellant,

vs.

MURIEL E. BARNESON, an Incompetent Person, by Lionel T. Barneson, Guardian,
Appellee.

APPELLANT'S STATEMENT OF THE POINTS ON WHICH HE INTENDS TO RELY UPON APPEAL, AND DESIGNATION OF THE RECORD ON APPEAL

Comes now the appellant in the above matter and presents his statement of the points on which he intends to rely on appeal, as follows:

1. Appellant adopts as his statement of the points on which he intends to rely the "Statement of Points on Which Defendant Intends to Rely on Appeal," filed in the District Court in the above action and included in the transcript of record filed in this Court.

Appellant designates the entire transcript of record to be printed.

/s/ FRANK J. HENNESSY,
U. S. Attorney,
/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Appellant.